

*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. 9882/08-09 LS

Child's Name: STUDENT

Date of Birth: xx/xx/xx

Dates of Hearing: 4/17/09, 7/20/09, 7/21/09,  
8/19/09, 10/22/09, 10/26/09,  
11/2/09, 11/11/09

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney:

Catherine Reisman, Esq.  
Reisman Carolla, LLP  
19 Chestnut Street  
Haddonfield, New Jersey 08033-1810

School District

Wallingford-Swarthmore  
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School District Attorney

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Date Record Closed:

November 25, 2009

Date of Decision:

December 10, 2009

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

This case concerns an elementary school aged child eligible for IDEA services due to a complex cluster of conditions, including epilepsy, speech apraxia and sensory-motor problems that impact Student's education. The child is currently enrolled in a private school funded by the District pursuant to a placement order issued in this matter on September 8, 2009, after the fourth hearing session. The first hearing session ended in an agreement between the parties for 2009 ESY services, which subsequently engendered an additional dispute over whether either of the parties breached their agreement or frustrated its purpose with respect to a reading tutor. The parties agreed that the issues concerning the ESY agreement should also be determined by the hearing officer on the basis of evidence produced as part of the record in this case.

In addition to full reimbursement for ESY services for 2009 and a private school placement for the 2009/2010 school year, Parents requested compensatory education for the child's first grade year (2007/2008); for six sessions of physical therapy in a swimming pool not provided as part of the allegedly agreed ESY services in 2008; for the 2008/2009 school year until March 9, 2009 and reimbursement for [[Program redacted]] reading instruction from March 10—July 14, 2009.

Soon after receiving the order granting Parents' request for a private school placement, the District moved for recusal of the hearing officer, which was denied by order dated September 23, 2009. The interim orders granting Parents' request for a private placement for the 2009/2010 school year and denying the District's motion to recuse are attached to, and incorporated into this decision, as Appendix I and Appendix II, respectively.

Based upon the entire record of seven (7) substantive hearing sessions and the first hearing session, which memorialized the parties' ESY agreement for the summer of 2009, Parents will be awarded the limited compensatory education they requested for the summer of 2008. Additional compensatory education will be awarded from October 2008 through March 9, 2009. Parents will also receive reimbursement for 120 hours of reading instruction by [Program redacted] for the last 12 weeks of the 2008/2009 school year, and reimbursement for a maximum of 80 hours of reading instruction received by [Program redacted] from the end of the 2008/2009 school year to the first day of the 2009/2010 school year, minus \$2,250.00, the

amount of the partial payment ordered on the record at the conclusion of the August 19, 2009 hearing session, provided, of course, that such payment has already been made.

### **ISSUES**

1. Is Student entitled to an award of compensatory education for any of the periods listed in ¶¶ a-c below, and if so, in what amount and in what form?
  - a. The 2007/2008 school year (1<sup>st</sup> grade);
  - b. The summer of 2008 (ESY)
  - c. The 2008/2009 school year (2<sup>nd</sup> grade)
2. Are Student 's Parents entitled to reimbursement for the costs of reading instruction provided to Student by [Program redacted] from March 10, 2009—July 14, 2009?
3. Are Student 's Parents entitled to reimbursement for the unpaid costs of reading instruction provided to Student by [Program redacted] as ESY services during the summer of 2009 by reason of the Wallingford-Swarthmore School District's breach of the ESY settlement agreement of April 17, 2009?

### **FINDINGS OF FACT**

1. Student (Student) is an elementary school aged child, born xx/xx/xx. Student is a resident of the Wallingford-Swarthmore School District and is eligible for special education services. (Stipulation, N.T. pp. 27, 28)
2. Student has a current diagnosis of Other Health Impairment (OHI) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 27)
3. Student has complex educational needs arising primarily from severe speech apraxia, a motor planning and output disorder manifested by difficulties in forming and articulating words. The disorder is characterized by inconsistent pronunciation errors; difficult transitions between sounds and syllables, such that syllables of words are segmented and/or elongated, with inappropriate pauses between syllables; difficulty with the melody of speech, particularly stressing the correct syllable, resulting from the respiratory effort required to produce appropriate pitch, inflection and volume. (N.T. pp. 49—51; S-37, p. 28)
4. After intensive speech therapy since early childhood, Student's speech has improved to the level of producing sentences of five or more words in length, and Student has begun to exhibit consistent phonological error patterns. As Student's vocabulary grows, however, intelligibility paradoxically decreases with the attempt to produce words of greater complexity, and with reduced context clues for the hearer, due to the attempt to express more abstract concepts. Consequently, although a functional speaker, Student still has significant issues with speech production. (N.T. pp. 52, 53)

5. Student is also more generally communication-impaired, with disorders in phonological processing, receptive and expressive language and social communication skills, which are common concomitants of speech apraxia. Student's receptive language skills have always exceeded expressive language skills, but those progressed with the use of an augmentative communication device, the Pathfinder, which provided an alternative means of communication. (N.T. pp. 54, 55, 87, 100, 105, 106)
6. By March 2009, Student's receptive language skills had advanced two to three years in a two year period, and were at approximately the level of a child aged six years two months for receptive language skills, and a year below that, at age five years two months, for expressive language. (N.T. pp. 85, 86)
7. Student used the Pathfinder in lieu of speaking when Student entered the District kindergarten in the 2006/2007 school year, but was able to dispense with it in 1<sup>st</sup> grade due to significant progress during a relatively brief period in 2007. Student began to learn to speak at age 6, coinciding with a tonsillectomy that cured sleep apnea. (N.T. pp. 55, 99—106, 1982; S-37, p. 28, S-47, p. 1)
8. After Student began speaking, social discourse was identified as a communication weakness by parental observation and a formal analysis by Student's speech therapist. Student made good progress in pragmatic language/social communication when provided with direct instruction in those skills (N.T. pp. 251--256; S-61, p. 4)
9. Language-based disorders often lead to reading difficulties, since phonological awareness (understanding sounds) and phonological processing, along with morphological skills (knowledge of the common rules of language) and visual knowledge, are fundamental to reading. Students' language and speech deficits adversely impact all aspects of education, including academic areas such as acquiring reading and math skills, and peer social interactions. (N.T. pp. 83, 87—89)
10. Student also has difficulties with motor praxis,<sup>1</sup> which impacts fine and gross motor coordination, social skills and interactions, play skills, higher order thinking skills such as problem-solving, working memory and organizational skills. (N.T. pp. 258—260; S-7)

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<sup>1</sup> Student's long-time occupational therapist from an independent provider, {redacted}, explained the term "motor praxis" as follows:

Praxis has four components to it. It's the process of creating or having an idea and then you organize and sequence each step of that idea in your head. That's the planning piece before you take any type of action. And then you physically execute each step. That's the motor action piece. And then there's an adaptive response piece; when the original plan of action is not working, you automatically adjust your plan into another action. We don't think about this process or each and every single step that we do in completing a motor action or thought into action. A simple example I can give to that is when we're forming letters on paper, we don't think about the process of where we have to start to form a letter and what direction we have to move our fingers in to letter...An important piece to understand about praxis is that it's automatic. It's like an instantaneous subcortical process. We don't consciously think about this process. We just do it.

N.T. pp. 258, 259

11. Student's motor praxis issues adversely affect academic functioning and the skills required for learning, processing and reasoning, particularly impacting tasks such as writing and math computation, which are more laborious when automaticity is lacking. (N.T. p. 260)
12. Student also has sensory integration difficulties, *i.e.* problems using all senses to functionally organize sensory information. This aspect of Student's disability impacts sustaining attention, filtering background noise and regulating activity level in order to sit still. Student's sensorimotor needs are addressed by physical and occupational therapy services. (N.T. pp. 227, 262, 263, 269, 270; S-7)
13. Student needs a daily "sensory diet" described as the combination and amount of activity and sensation that permits an individual to be alert and functioning at his/her best. The sensory diet is an individualized treatment plan designed to meet Student's unique sensory needs, consisting of deep breathing techniques, gross motor activities, brushing and application of deep pressure for proprioceptive input. The sensory diet must be delivered at regular intervals throughout Student's school day. The techniques have a calming effect that helps Student organize and regulate sensory information and thereby become more available for learning. (N.T. pp. 227, 264, 265, 270; S-51)
14. From the time Student entered kindergarten, the District contracted with the same independent agencies that had provided speech/language therapy and OT/PT to remediate Student's speech apraxia, motor praxis and sensory integration deficits. The District also provided additional speech and OT/PT services through its own staff during the 2007/2008 and 2008/2009 school years. (N.T. pp. 60—62, 94—97, 100, 102, 227, 261, 268, 269, 278, 290)

#### 2007/2008 School Year

15. Student's IEP for the 2007/2008 school year (1<sup>st</sup> grade) was developed in a series of meetings beginning in January 2007, while Student was still in kindergarten. The first IEP covering the 1<sup>st</sup> grade year was to begin in February 2007 and end in February 2008. Revisions to the January 2007 IEP were made in February, March and August 2007. Student's 1<sup>st</sup> grade special education teacher, who remained Student's case manager through the end of the 2008/2009 school year, first participated in the August 2007 IEP meeting. (N.T. pp. 228, 229, 894, 895, 897, 969; S-40, S-41, S-42, S-49)
16. The first full IEP for the 2007/2008 school year was developed in November 2007, and subsequently revised in December 2007, January, February and March 2008. All IEPs in place for the 2007/2008 school year included goals for reading, writing and math skills, but the IEP carried over from the kindergarten year focused more on foundational academic skills and language skills. (S-40, S-74, S-189, pp. 27, 28)
17. From the beginning of the 2007/2008 school year, Student's special education teacher consulted with the regular 1<sup>st</sup> grade teacher and modified activities and class work for Student, including writing which was delivered in the regular education classroom.

Regular education tasks, particularly in the early months of 1<sup>st</sup> grade, included a lot of hands-on activities such as building with blocks in social studies and simple experiments in science. The writing curriculum was Kid Writing. Student's reading and math instruction were delivered in the special education classroom. (N.T. pp. 904—907, 909)

18. Student's IEP progress reports in January 2008 included teacher notes concerning the skills Student had mastered in working toward the IEP goals in reading and math from the beginning of the school year through the end of the second quarter. By that time, Student could identify all uppercase and most lower case letters and had exceeded the goal of 1:1 correspondence for groups of 10. (N.T. pp. 919—922; S-62, p.14)
19. By February 2008, Parent had become concerned about Student's ability to successfully access the regular education curriculum in light of limited reading goals included in the proposed IEP revisions and believed that Student should receive direct 1:1 reading instruction. Parents, however, signed a NOREP dated January 29 and February 26, 2008 for an IEP that did not include 1:1 reading instruction in either the goals or list of specially designed instruction. (N.T. pp. 234—244, 943; S-71, S-72, S-73, S-74)
20. Student's IEP goals in reading, writing and math were updated in the winter and early spring of 2008. Student was receiving intensive, multi-sensory reading instruction in a group that included 3 other students and was participating successfully in the Kid Writing program. The present levels included in the IEP revisions also demonstrated progress in reading, writing and math during the 2007/2008 school year. (N.T. pp. 937—943, 963; S-73, S-74, p.8)
21. Student continued to make progress in writing and math during the second half of the 2007/2008 school year, but did not master all goals. In math, the 1:1 correspondence goal contemplated the ability to count objects to 25, while Student increased from being able to count 12 objects in January 2008 to 14 in June 2008. In writing, Student could consistently answer all 5 "wh" questions, but teacher prompts averaged 7, against the goal of answering 4 of 5 "wh" questions with fewer than 6 teacher prompts on 3 consecutive occasions (S-62, p. 14, S-83, pp. 4, 5)
22. By the end of the 2007/2008 school year, Student had mastered the sounds for all letters of the alphabet; was able to read 54% of the Dolch preprimer sight word list, an increase from 21% that Student could read in March 2008 and was assessed at a preprimer Level D reading level. (N.T. pp. 946, 947, 954—956; S-83, p. 4, S-94, S-99)

#### 2008/2009 School Year

23. For the 2008/2009 school year (2<sup>nd</sup> grade), Student was assigned to a different teacher for reading instruction. Beginning of the year reading assessments indicated that Student had not maintained the ability to read as many of the Dolch sight words as at the end of the prior school year. Student had also ended the prior school year at a preprimer Level D, but at the beginning of the 2008/2009 school year, was instructional at Level C. (N.T. pp. 970, 1128—1132, 1219; S-99, S-101, S-165, p. 6)

24. Both Parents and District were concerned when Student did not recoup the reading skill level reached during the previous year by the end of October 2008, approximately 6 weeks into the new school year. Student did not return to the reading levels assessed at the end of the 2007/2008 school year at any time during the 2008/2009 school year. (N.T. pp. 1132, 1133, 1137, 1219—1221, 1227, 1209, 1210; S-103, S-106, p. 3)
25. The District arranged for a reading evaluation by Delaware County Intermediate Unit (DCIU), which was conducted in late November 2008. The assessments included in the evaluation placed Student at the level of a beginning reader, at levels ranging from kindergarten to the beginning of 1<sup>st</sup> grade. The DCIU evaluation did not recommend any fundamental change to Student's reading instruction. Student's special education teacher made no changes to Student's reading instruction during the 2008/2009 school year, other than "tweaking" her methods and techniques, which were a blend of strategies drawn from Project Read, the program primarily used for Student's reading instruction, and the teacher's general fund of professional knowledge. (N.T. pp.1166—1169, 1191—1203, 1221, 1227, 1228, 1237, 1240, 1250; S-105A, S-107, S-123, S-196)
26. Beginning in January 2009, Student's reading teacher began instructing Student with one other child rather than in the original 4 pupil grouping. Student received 45 minutes of reading instruction daily, which did not increase during the 2008/2009 school year. By the end of October 2008, Student was receiving 1:1 reading practice from Student's aide during part of the reading instruction period. By December, Student's reading teacher was questioning whether Project Read was the appropriate reading program for Student, but the teacher continued to use Project Read as the primary component of Student's reading instruction. (N.T. pp.1184—1186, 1211, 1245, 1250, 1251, 1265; S-196)
27. By January 2009, Parents requested a private school placement where student could receive a different type of reading instruction. After exploring a number of options for an immediate change of placement with no success, Parents enrolled Student in the [Program redacted] educational testing and remedial center in [location redacted] in March 2009. (N.T. p.144; P-23, p. 4)
28. [Program redacted] initially assessed Student's reading ability in January 2009 and concluded that Student was functionally a non-reader. Student received a total of 298 hours of instruction from [Program redacted] in the "[redacted]" program from March 10, 2009 to July 14, 2009. The initial written [Program redacted] recommendation was for 15 hours/week of instruction for 18-20 weeks. (N.T. pp. 118—122, 145; P-23, S-146, p. 4)
29. Most of the assessments given to Student by [Program redacted] in July 2009, after completing the initial period of instruction, showed little or no change from the same assessments administered in January 2009, prior to beginning instruction. The only measurable exception was the beginning and ending score on the Woodcock-Johnson Test of Reading Mastery, in which Student advanced, according to the pre and post tests, from a beginning kindergarten to an end of first grade level, an increase from the 2<sup>nd</sup> to the 16<sup>th</sup> percentile. (N.T. pp.124; P-23, p. 1)

30. [Program redacted] Instructors met with Student’s speech-language therapist to gain an understanding of Student’s speech apraxia and the difficulties it is likely to cause with reading instruction. (N.T. p. 126, 127)

#### Assistive Technology

31. In response to an inquiry from Student’s case manager in preparation for an IEP meeting in August 2008, before the school year began, Student’s OT provider recommended a laptop computer to permit Student better access to the regular education curriculum because Student could not keep up with peers in activities that required writing. (N.T. pp. 266, 267; P-1)
32. During the fall of 2008, the District arranged for an assistive technology consultation, and later a full SETT evaluation for Student from DCIU. (N.T. pp. 1508)
33. The DCIU consultant was aware of Parents’ request for a laptop computer, but also recommended trying a combination of low-tech strategies such as letter stamps, post-it notes, magnetic letters and word banks, along with the targeted use of a computer for certain writing tasks. The consultant expected the low tech strategies to permit better peer interaction, and development of foundational skills for achieving greater independence in writing and other academic tasks, because Student would be unable to immediately use a computer independently. (N.T. pp. 1508—1515, 1526, 1527; S-102)
34. The consultant recommended modifications to the classroom environment to make computer use easier in light of Student’s sensorimotor issues and recommended computer hardware and software such as “Intellikeys” and keyboard overlays that could retrieve key concepts for content area subjects, such as science and social studies, to facilitate learning the concepts with less need to type. (N.T. pp. 1516, 1519, 1596—1602)
35. The DCIU consultant also suggested strategies to Student’s teachers for reducing output demands when assessing Student’s knowledge and understanding of content areas by providing alternatives to open-ended responses, using graphic organizers that were more appropriate for Student, *i.e.*, less confusing than the web-type diagrams she observed being used for writing activities, and modifying worksheets. (N.T. pp. 1516—1523, 1528—1530)

#### ESY Issues—2008

36. Parents wanted Student’s 2008 ESY program to include OT and PT services several times each week at [agency redacted] which provided Student’s long term therapist. Because a swimming pool was available at the District’s camp program, which provided other components of the 2008 ESY program including two weekly sessions of physical therapy in the pool, Parents were willing to add two additional pool sessions/week in lieu of half of the sessions requested at [agency redacted]. (N.T. pp. 338, 878, 879, 1612)



37. Because Student received only six pool sessions by July 25, 2008 and had missed one [agency redacted] therapy session, Parents requested compensatory services to be provided during the remainder of the summer. (N.T. pp. 879, 880; S-86)
38. Although the District disagreed with Parents' description of the parties' agreement concerning the number of pool sessions to be provided during the 2008 ESY program, the District ultimately offered to provide, and Parents agreed to accept, 6 additional therapy sessions in the District swimming pool with a District physical therapist. The additional sessions have not been provided. (N.T. pp. 338—341, 880, 1613—1621, 1625—1627; S-115)

ESY Issues—2009

39. On April 17, 2009, a hearing session was convened in this matter to take evidence concerning an appropriate ESY program for Student during the summer of 2009. Prior to opening the record, however, the parties reached an agreement for a camp-based summer program, along with additional PT/OT and reading services. (N.T. pp. 6—9)
40. The agreement with respect to the additional reading services, which subsequently became a matter of further dispute between the parties, was stated on the record by Parents' counsel as set forth below:

THE HEARING OFFICER: Good afternoon. The Due Process Hearing for Student , file number 9882/08-09 LS is hereby convened. ...

I have been informed that the parties have reached a an agreement regarding the extended school year issue that we came together for this morning for the hearing. So I believe the parties at this point would like to put the terms of that agreement on the record. Is that accurate?

MS. REISMAN: Yes, it is.

MR. ROMBERGER: Yes.

THE HEARING OFFICER: Go ahead.

MS. REISMAN: The parties agree that, in settlement of their dispute regarding extended school year, school year services, the Wallingford-Swarthmore School District will provide the following services to Student during the summer of 2009....The District will also provide direct one to one instruction in reading by an individual trained in a systematic, multi-sensory, research-based, phonemic reading program, [Program redacted], with training and certification details to be provided to the parents by June 1st. If the District cannot locate an appropriately certified, trained or certified tutor by June 1st the District will obtain a tutor through [Program redacted] in [location redacted]. Student will receive a minimum of four to five (sic) hours and a maximum of 80 hours of direct one to one instruction. The amount of one to one instruction will be determined by data review on or before July 20th, 2009 by recommendation of the District [Program redacted] tutor in conjunction with [individual redacted] or her designee. ...

THE HEARING OFFICER: Mr. Romberger, does that reflect your understanding

of the agreement?

MR. ROMBERGER: Correct. On behalf of the District that is acceptable.

HEARING EXAMINER: And I assume the parents having heard it and it is acceptable to the parents. Is that accurate?

MS. : Yes.

MR. : Yes.

THE HEARING OFFICER: And Mr. [LEA]

MR. [LEA]: Yes.

THE HEARING OFFICER: All right. Well, thank you very much.

(N.T. pp. 6—9)

41. On the same day the ESY agreement was recorded, the District identified a reading specialist employed by the DCIU to deliver the additional reading instruction specified in the parties' agreement. The reading specialist is certified as a Wilson reading teacher, is a trainer for Project Read and Read Naturally and is trained in and qualified to teach [Program redacted] reading programs, specifically, [programs redacted]. (N.T. pp. 1453—1455, 1648)
42. All school districts within DCIU contract from time to time for the reading specialist to provide direct, one-to-one multi-sensory, research-based reading instruction to students during both the regular school year and for ESY programs. ESY instruction for two other District students had been arranged in June, but the request to provide services to Student was not made by the District until July. (N.T. pp. 1455, 1483, 1488, 1495, 1503, 1504)
43. The reading specialist and Parents met briefly in April 2009. By June 1, Parents began requesting the teacher's contact information from the District in order to discuss the tutoring schedule and arrange for the reading specialist to observe Student in the [Program redacted] class before it ended in mid-July and to discuss with Student's [Program redacted] instructors the number of hours instruction that should be provided during the summer. (N.T. pp. 1456, 1467, 1471, 1648)
44. On July 9, the District requested that the reading specialist contact Parents to arrange for forty to forty-five (40—45) hours of reading instruction. The subsequent telephone conversation between the tutor and Parent engendered considerable conflict over the schedule and the maximum number of hours, since Student's Mother told the instructor that it could be as high as eighty (80) hours, while the District had specified no more than 45 hours. The teacher had also finalized scheduling with other students in June, and did not feel comfortable adjusting their schedules at that point. (N.T. pp. 1456—1458, 1465, 1466, 1495—1497, 1499, 1503, 1651, 1653, 1657)
45. Additional conflict arose when Parent asked the teacher to observe Student at the [Program redacted] program, which was ending several days later, in order to facilitate a smooth transition in instruction, due, in part to Student's behavior issues, but the teacher was not available due to a planned trip. (N.T. pp. 1457, 1479, 1653, 1654)
46. Because the instructor believed that she had been placed in an untenable position and was

being “set up to fail,” she declined to provide the reading instruction after her conversation with Parent. The teacher could have been persuaded to change her mind had the District requested that she reconsider, the scheduling restrictions been removed and she felt that Parent was willing to work with her. (N.T. pp.1460—1462, 1464)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Parties’ Arguments/Legal Standards**

As is often the case in special education claims, neither of the parties is entirely correct in their factual/legal positions in this matter. The District argues that its conduct is to be assessed in terms of the effort it made to provide Student with FAPE during the 2007/2008 and 2008/2009 school years, not its ultimate success. That contention is not, however, entirely accurate. Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one 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). “Meaningful benefit” means that an eligible child’s program affords Student or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet Student’s/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if Student’s program is not likely to produce progress, or if the program affords the child only a

“trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Effort, therefore, is not the entire criterion by which the District’s conduct is to be judged. Rather, the evidence must be examined in light of whether the District’s efforts were appropriately targeted toward meeting the Student’s many and complex needs. Otherwise, any special education services provided to an eligible child would be deemed sufficient without considering whether such services were reasonably calculated to provide meaningful educational benefits.

Parents contend that the District entirely failed to provide the Student with FAPE during both school years at issue in this case. The basis for Parents’ claim for the 2007/2008 school year, however, is not consistent with the legal standards because it relies heavily on procedural deficiencies in the 2007/2008 IEPs, which is not a legally sufficient basis for a compensatory education claim. No compensatory education may be awarded for procedural deficiencies that do not result in, *inter alia.*, a deprivation of educational benefits. *See* 20 U.S.C. §1415(b)(3)(E)(ii)(III). Parents also base their claim for the 2007/2008 school year, in part, on the absence of individualized reading instruction. Although that might certainly have provided Student with greater educational benefits, as discussed more fully below, the evidence in the record establishes that Student made meaningful progress in reading during 1<sup>st</sup> grade, and, therefore, that the reading instruction provided by the District was appropriate. Under the interpretation of the IDEA statute established by the *Rowley* case and other relevant cases, the District is not required to provide an eligible child with services that will assure the “absolute best” education or that maximize the child’s potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995).

## **Academic Instruction—2007/2008, 2008/2009 School Years**

### **1<sup>st</sup> Grade—2007/2008**

Although Parents seek compensatory education from the beginning of 1<sup>st</sup> grade (2007/2008 school year), the only evidence of inappropriate academic instruction in the record with respect to the fall of 2007 is Parents' testimony that they did not see modified worksheets during 1<sup>st</sup> grade. (N.T. pp. 232, 233) That testimony, however, falls far short of contradicting the credible testimony of Student's case manager and 1<sup>st</sup> grade teacher that work was modified for Student. (F.F. 17) Moreover, the teacher's testimony that instruction and output in the regular education classroom during the early part of 1<sup>st</sup> grade was fairly informal for all students was both uncontradicted and makes sense in terms of the common sense notion that all students require a period of transition to the greater academic demands of grade school.

The record discloses that Parents first raised concerns about academic instruction during 1<sup>st</sup> grade in late February 2008. (F.F. 19; S-72) Parents provided little, if any, evidence via either testimony or documents concerning Student's math and writing instruction and progress in 1<sup>st</sup> grade. In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof. Parents, therefore were required to establish that the math and writing instruction provided by the District were not reasonably calculated to assure that Student would derive meaningful educational benefit, but provided insufficient evidence to support such conclusion.

Student's progress in Kid Writing, a regular education program delivered in a regular education setting, was meaningful, especially in light of the significant language disability. Student was able to answer questions expected of all students. *See* N.T. p. 977—Student's

writing goals relating to “wh” questions were the same as those for regular education students. Although Student required teacher prompts, the June 2008 progress report indicated the ability to answer 5 rather than 4 questions, with an average of one more prompt than included in the writing goal. (F.F.21)

The evidence establishes that Student made meaningful progress in reading in 1<sup>st</sup> grade, notwithstanding Parents’ belief that Student would have made better progress if provided with more intensive instruction on a 1:1. (F.F. 20, 22) Although Parents may well be correct that more intensive instruction would have resulted in greater progress, Student is entitled to appropriate, not optimum instruction. Since Parents provided no convincing evidence that Student did not make meaningful progress in reading writing and math skills during 1<sup>st</sup> grade, Parents’ claim for compensatory education for the 2007/2008 school year will be denied.

#### 2<sup>nd</sup> Grade—2008/2009

There is no dispute that when the 2008/2009 school year began, Student’s reading skills had regressed from the levels achieved by June 2008 and were not recouped within the expected amount of time, approximately 6 weeks, and indeed, throughout the period Student was receiving reading instruction from the District during the 2008/2009 school year. (F.F. 24) Given Student’s reading progress in 1<sup>st</sup> grade, and the testimony of Student’s 2<sup>nd</sup> grade teacher that she was continually adjusting Student’s reading instruction through the fall of 2008, yet saw no progress and questioned the appropriateness of the Project Read program by December, it is difficult to understand why the District made no significant change to Student’s reading instruction at any time during the 2008/2009 school year. (F.F. 25, 26)

The District’s failure to act is particularly surprising in light of the concerns expressed by both Parents and the District members of the Student’s IEP team from October 2008 through the

March 9, 2009 IEP team meeting, and the District's willingness to consider a private school placement in January 2009, including sending Student for a brief trial placement. *See*, N.T. pp. 748—751, S-153. It appears that the District was willing to provide only the private school it believed would be appropriate. Even more surprising, the record reveals that there was a reading specialist on the DCIU staff trained in a number of multi-sensory programs, including [Program redacted], Wilson and Project Read, who was the District's immediate choice to provide [Program redacted] ESY instruction in April 2009, and who worked with students in various school districts within DCIU to provide instruction during the school year as well as the summer. (F.F. 41, 42) Although the District sought a reading evaluation from DCIU fairly early in the 2008/2009 school year, there is no evidence that the District ever considered requesting a consultation specifically from that DCIU reading specialist, even when Parents explicitly requested [Program redacted] reading instruction in March 2009.

It is, of course, entirely possible that the DCIU reading specialist would not have been available to provide instruction to Student, or that by March 2009, Parents would have rejected any change in reading instruction proposed by the District. Nevertheless, had the District continued to make reasonable and appropriate efforts to address Student's lack of progress in reading by, *e.g.*, seeking a consultation specifically from the DCIU reading specialist trained in Wilson and [Program redacted] and Project Read to suggest which, if any, of those reading methodologies might be most successful for Student, the District might have entirely avoided liability for failing to propose appropriate reading instruction once it became obvious that Project Read, at least as delivered to Student by Student's 2<sup>nd</sup> grade special education teacher was singularly unsuccessful.

As it is, however, the Student's persistent lack of reading progress through the fall of 2008 should certainly have alerted the District that it needed to do far more than "tweak" Student's reading instruction. When Student did not recoup reading skills by the end of October 2008, the District should have made greater efforts to determine whether an entirely different research-based multi-sensory reading program would have resulted in meaningful progress.

The District, however, is entitled to the benefit of a reasonable period to continue with the reading instruction that had provided Student with meaningful progress during 1<sup>st</sup> grade before it could be expected to realize that the reading instruction no longer successful for the Student. *M.C. v. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996). Consequently, the District is not liable for providing inappropriate reading instruction during the first six weeks of the 2008/2009 school year, a reasonable period to determine whether Student could recoup the reading skills that had regressed from the end of the 2007/2008 school year.

#### **Reimbursement for [Program redacted] Reading Instruction, March 2009—July 2009**

It is certainly understandable that Parents wanted a major change in Student's reading instruction by March 2009 in order to promote renewed progress in Student's reading skills, since the District had failed to develop and offer an alternative to the reading instruction that was no longer effective for Student. Moreover, as the District's Director of Special Education testified, the District had provided [Program redacted] instruction to at least one other District student in the past. (N.T. p. 372) Consequently, it was not unreasonable for Parents to request that instruction for Student for the latter part of the 2008/2009 school year.

Student made some, albeit very little, measurable progress as a result of the [Program redacted] reading instruction. (F.F. 29) Some progress, however was a distinct improvement over the regression in reading skills that Student had experienced between the end of the



2007/2008 school year and the date Student no longer received reading instruction within the District. Student had no discernible recoupment of reading skills during the 2008/2009 school year. (F.F. 24)

Nevertheless, there is no evidence in the record upon which to conclude that the number of hours of reading instruction provided by [Program redacted], approximately 4 hours/day, 5 days/week from March 10 through July 14, 2009, resulting in a total of 298 hours, was appropriate for Student and/or necessary for the level of progress Student achieved. The director of the [Program redacted] center who testified at the due process hearing provided no detail concerning why that number of hours was provided, stating only that recommendations for hours of instruction were based upon testing and conversations with the family. (N.T. pp. 130, 144) There was no explanation why Student received more hours of instruction than the original written recommendation for 3 hours/day of instruction, 5 days/week for 18—20 weeks, *i.e.*, 120—300 hours. (S-146, p. 4)

It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received FAPE. 20 U.S.C. §1415(f)(3)(E). Moreover, just as courts hearing civil actions brought to challenge a decision of a hearing officer are directed by the IDEA statute to “grant such relief as the court determines is appropriate,” the hearing officer must, at times, fashion an appropriate equitable remedy where FAPE has been denied but the substantial evidence of record does not support the totality of Parents’ claim. *See*, 20 U.S.C. §1415(i)(2)(C); *Simchick v Fairfax County School Board*, 553 F.3d 315 (4<sup>th</sup> Cir. 2009). Here, there is no question that the District was not providing Student with appropriate reading instruction at the time Parents enrolled student in the [Program redacted] center and that the [Program redacted] instruction was appropriate for

Student, since Student did make measurable progress during the time Student was receiving that reading instruction. Nevertheless, as noted above, there is insufficient evidence that Parents are entitled to full reimbursement for those costs because the record provides no real basis for concluding that the 298 hours provided, which extended past the normal school year, is a reasonable and appropriate number of hours.

There is, however, additional evidence that supports the conclusion that 120 hours of reading instruction from the time Student left the District for reading instruction on March 10, 2009 through the end of the school year is a reasonable estimate of the amount of intensive reading services Student should have received in that period. The head of the private school at which Parents sought and were granted placement for the 2009/2010 school year testified that the school provides 2 hours/day of reading instruction. (N.T. p. 198). Since there were approximately 12 weeks of school remaining when Student began receiving 2 hours of reading instruction/day or 10 hours/week, which coincides with the [Program redacted] written recommendation of a minimum of 120 hours, Parents will be awarded reimbursement for 120 hours of reading instruction at the [Program redacted] hourly rate of \$98.00, for a total of \$11,760.00. (N.T. p. 865; P-23, p. 4)

### **Assistive Technology Issues**

As Student entered 2<sup>nd</sup> grade in the 2008/2009 school year, Parents began to focus on how assistive technology could be useful for Student, particularly in regular and fully accepted their private OT's suggestion that a laptop computer would be beneficial for Student's full participation in the regular curriculum with typical peers. Determining how best to modify both the school environment and academic tasks to accommodate Student's difficulties with language and motor skills was, however, not a simple process. *See, e.g.*, N.T. pp. 1516, 1596—1602

(computer modifications); 1521, 1523, 1528 (scaffolding academic tasks, altering response methods and adapting materials). The gist of the DCIU assistive technology consultant's testimony was that a balance needed to be achieved between finding the most effective means for Student to access, and demonstrate understanding of, the content of the regular curriculum in light of Student's disabilities and other considerations, such as fostering independence and increasing opportunities for peer interaction. The consultant was obviously knowledgeable, and her testimony described an impressive array of simple and more complex strategies and devices for achieving access to the curriculum while taking other relevant concerns into account. (F.F. 33, 34, 35)

It was equally obvious from the consultant's testimony that she was angry and resentful toward Parents because she believed that they rejected many of her recommendations out of hand, without a long enough trial, in single-minded pursuit of "high tech" options, particularly the laptop. (N.T. pp.1510, 1543, 1544) The underlying problem in the relationship between Parents and the consultant, however, was the absence of a direct relationship due to the lack of opportunity for communication between the consultant and the Parents other than through the District. The consultant testified that she relied on the District to convey Parents' concerns and the recommendations of Student's OT provider to her and her recommendations to Parents and the OT, believing that the District should determine who participates in the SETT process meetings and that she needed the District's permission to speak to the outside OT. (N.T. pp. 1553, 1557)

Consequently, both the consultant and Parents knew only what the District chose to explain to each of them with respect to Parents' concerns on the one hand and the consultant's recommendations on the other. The Parents' and consultant's negative perceptions of each other

arose and were maintained by the absence of direct communication. At the least, the District should have encouraged consultation between Student's OT provider and the assistive technology consultant. It was the District's responsibility to assure that the assistive technology evaluation process was conducted in a manner that assured it would result in an appropriate plan, reasonably calculated to provide equipment and services that would diminish the adverse effects of Student's disabilities in the classroom, thereby meeting Student's needs.

The District's most egregious lapse, however, was its failure to actually implement the consultant's recommendations, which required careful, systematic and consistent planning to use both high and low tech strategies and devices to meet Student's classroom needs. The record is replete with evidence that planning and consistency were sorely lacking. *See, e.g.*, Appendix 1, p. 3, ¶8

The most telling example of how the District's decision to discourage direct communication between Parents and the assistive technology consultant, compounded by its failure to properly implement the consultant's recommendations, put Parents and the consultant at odds involved Student's use of letter stamps as a means of completing work sheets. Parents noted how laborious it is for Student to find, select and finally use the stamp to print individual letters to form words, maintaining that typing would considerably shorten response time, and questioned the consultant's recommendation of that "low tech" strategy. (*See, e.g.*, N.T. p. 620) The consultant did not understand Parents' objection, noting, "We weren't asking Student to write sentences with it. We were asking Student to do...a one-letter response" (N.T. p. 1545). In fact, however, Student's teachers were asking Student to compose multi-letter and multi-word responses using letter stamps, contrary to the consultant's expectation and recommendation. (N.T. pp. 1565, 1566; P-22, pp. 18—21) Had Parents and the consultant spoken directly about

the letter stamps, Parents would have understood how the consultant envisioned the use of letter stamps as part of Student's assistive technology repertoire, and the consultant would have realized and corrected the teachers' error in implementing that recommendation..

Finally, testimony from the District noting concerns about assuring teachers the flexibility to determine how and when to use various strategies, equipment and techniques was disingenuous and provided no support for the District's position that it was providing Student with appropriate assistive technology. The District quite simply did nothing to plan for consistent and effective use of the computer or any other assistive device. There is no evidence that Student's teachers engaged in daily "mapping" of Student's classes to anticipate where assignments or Student's responses needed to be modified and how best to foster independent completion of class work. Months after the SETT process was completed and assistive technology purportedly incorporated throughout Student's school day, the school principal admitted that teachers would need to begin to consider how the computer and other techniques should be used on a daily and consistent basis as the beginning of a new school year approached. *See, e.g.,* N.T. pp. 741, 799.

Although it was not unreasonable for the District to wait until the beginning of the 2008/2009 school year to undertake a full SETT evaluation, once the DCIU consultant began making recommendations for modifying Student's assignments and output, the recommendations should have been properly and consistently implemented. Because the record establishes that the District did not appropriately use assistive technology throughout the school day to accommodate Student's motor praxis difficulties, compensatory education will be ordered for that failure.

**2008 ESY**

Although the District does not accept Parents' position that the parties had agreed to a specific number of swimming pool PT sessions during the summer of 2008, there is no disagreement that the District offered, and Parents accepted, 6 sessions of PT in a swimming pool provided within the District by a District physical therapist to resolve that dispute. (F.F. 38) There is also no disagreement that the sessions have not yet been provided.

Parents' claim for 2008 ESY is limited to the 6 sessions of swimming pool PT. Without further explanation, the District urges that this aspect of Parents' claim be denied on the equitable grounds that it is "too late for compensatory education" for this claim. *See* [redacted] District Closing Argument Re Past Programming at p. 7. The District asserts that it made a good faith effort to provide the services but Parents could not agree on a schedule. Since there is no suggestion that it would be any more difficult for the District to provide the pool sessions now than it was at any time in the fall of 2008 through the inception of this case and going forward, the District' basis for its position that the claim should be denied on equitable grounds is unclear. The parties indisputably entered into an agreement that has not yet been performed. There is no suggestion in the record that the District placed a time limit on its settlement proposal either when it was offered or accepted. Consequently, the District will be ordered to provide the six pool sessions in accordance with the parties agreement resolving their dispute over the summer 2008 ESY program

### **2009 ESY Agreement**

The parties' agreement concerning the District's obligation to provide summer reading instruction by a [Program redacted] certified tutor is unambiguous. (*See* April 17, 2009 Agreement, F.F. 40) The District was required to locate the tutor and provide Parents with certification details by June 1. (F.F.40) Obviously, this term of the agreement includes the

implied requirement that the tutor who was located would actually be available to provide the reading services, *i.e.*, hired for at least the minimum number of hours by June 1 and available for the potential maximum number of hours. The testimony of the tutor who contacted Parents in early July was unequivocal—she was hired in July not by June 1. (F.F. 44; N.T. 1504) Although the District had identified the tutor in April, and contracted with her in June to provide ESY services to two other District students, it failed to finalize the tutor’s services by June 1 for this Student for at least 45 hours of reading instruction. That lapse in fulfilling an essential requirement of the parties’ agreement obligated the District to provide the alternative reading services through the [Program redacted] facility in [location redacted].

Moreover, the District’s conduct in waiting until early July to notify the tutor that the District proposed to hire her for Student’s reading instruction ultimately made it virtually impossible to assure that the tutor could provide the agreed maximum hours of reading services should that become necessary. The District was well aware of the number of hours of other programming, including OT and PT, that Student was to receive weekly during the summer. Since the District had also hired the same tutor in the past, and for other District students for the summer of 2009, it could not have been unaware that other districts also contracted with the same tutor. The District, therefore, should certainly have known that delaying notice to the tutor until the beginning of July that the District was definitely hiring her to provide reading instruction to Student was likely to create difficult scheduling issues. Consequently, it most unfortunately appears likely that the District’s timing in hiring the tutor was designed to limit the number of hours of reading instruction to the 40—45 hours the tutor had been told she would be hired to provide, notwithstanding the potential for as many as 80 hours of instruction according to the explicit terms of the parties’ agreement. (F.F. 40) Although the tutor testified that she

could have provided the maximum of 80 hours of reading instruction, it is difficult to see how that could, in fact, have occurred given the time constraints on both the tutor's and the Student's time. The tutor's fear that she was being set up to fail does not appear to have been inaccurate, but cannot be attributed solely to the Parents, as the tutor did, since it was the District's conduct that led to the conflict between Parent and the tutor when they spoke about the specifics of the reading services for the first time in July 2009, and the tutor revealed to the Parent in that conversation that she was expecting to provide no more than 45 hours of reading instruction in accordance with the District's directive. (F.F. 44)

Finally, the District breached the parties' agreement by telling its proposed tutor that the District wanted to provide the least number of instructional hours specified in the agreement, regardless of the term of the agreement that provided for data review and consultation between the District tutor and personnel from the [Program redacted] facility-- and the tutor's ultimate responsibility to determine the specific number of hours of reading instruction.. *See* N.T. pp. 1467, 1468, 1476. Having been informed by the District that it wanted to provide the minimum number of hours, it is difficult to believe that the tutor would have come to a different conclusion upon review of the data, since it was her understanding that it was up to the District alone to decide upon the number of hours of reading instruction she would provide. Nevertheless, that breach did not ultimately affect performance of the contract, since the District failed to locate a [Program redacted] reading tutor by June 1, in the sense of actually contracting for tutoring services for Student and assuring that the maximum number of hours could be delivered if necessary.

The parties' agreement included a remedy for failure to timely locate a [Program redacted] tutor: instruction provided by the [Program redacted] center in [location redacted],



which the Parents obtained at their own expense when the District did not provide a reading tutor. In the absence of a timely review of Student's [Program redacted] records to determine the appropriate number of hours to be provided during the summer of 2009, Parents will be reimbursed for the amount of hours, up to the agreed maximum of 80 hours, for the instruction at [Program redacted] between the last day of the District's 2008/2009 school year and the first day of the District's 2009/2010 school year at the rate of \$98.00/hour, reduced by the amount ordered on the record at the August 19, 2009 hearing session, \$2,250.00 (N.T. pp. 865, 866), provided, of course, that Parents have already received a payment in that amount from the District. The remaining amount due as reimbursement to Parents for 2009 ESY services is a maximum of \$5590.00

The reimbursement is explicitly limited to 80 hours of summer instruction, not the full amount paid by Parents from the end of the school year to July 14, plus an additional 80 hours for the remainder of the summer.

### **Compensatory Education**

The Student is entitled to an award of compensatory education for both inappropriate reading instruction and improper implementation of the DCIU consultant's assistive technology recommendations during the 2008/2009 school year, measured from the time the District knew or should have known of its failure to provide FAPE. *M.C. v. Central Regional School District; Heather D. v. Northampton Area School District*, 511 F.Supp.2d 549 (E.D. Pa. 2007). Here, the District will be given a six week grace period from the beginning of the 2008/2009 school year as a reasonable period to determine that the reading instruction provided to Student had become ineffective, and, therefore, inappropriate. The same period will be granted as a reasonable time

to obtain the advice of the DCIU consultant for appropriate assistive technology devices and strategies, and to appropriately implement the consultant's recommendations.

Beginning with the 7<sup>th</sup> week of the 2008/2009 school year and continuing to March 9, 2009 the date Parents identified as the end of the compensatory education period, Student is awarded full days of compensatory education, measured by the cost to the District of educating the Student during that period, based upon the averaged compensation of Student's special education and regular education teachers during that period, including salary and fringe benefits.

### **ORDER**

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

1. Reimburse Student 's Parents for the cost of 120 hours of reading instruction at the [Program redacted] Center in [location redacted] at the rate of \$98.00/hour, for a total of \$11,760.00.
2. Reimburse Student 's Parents for the cost of 80 hours of reading instruction for ESY services during the summer of 2009 at the rate of \$98.00/hour, minus \$2,250.00 if that amount has already been paid, for a total of \$5,590.00 (\$7,840.00 if the amount ordered on the record on August 19, 2009 has not been paid)
3. Provide Student with a fund representing full days of compensatory education from the beginning of the 7<sup>th</sup> week of the 2008/2009 school year through March 9, 2009 in accordance with the following standards:
  - a. The value of the compensatory education award shall be measured by the averaged daily compensation of Student 's special and regular education teachers during the 2008/2009 school year, including salary and fringe benefits.
  - b. Parents may decide how the compensatory education hours/compensatory education fund is used. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that will assist Student in overcoming the effects of Student's disabilities. Parents may also use the fund to pay unreimbursed costs for [Program redacted] reading instruction.

December 10, 2009

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER