

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LOWER MERION SCHOOL DISTRICT,	:	
	:	
Plaintiff/Respondent	:	
	:	
v.	:	Civil Action No.
	:	
	:	
R.C., a minor, by and through	:	
his parent and natural guardian,	:	
J.C.	:	
	:	
	:	
Defendants/Petitioners.	:	

**NOTICE OF REMOVAL**

Pursuant to 28 U.S.C. § 1441(a), notice is hereby given that petitioner J.C., on behalf of her minor son, R.C., defendants in an action filed on September 6, 2011, in the Commonwealth Court of Pennsylvania as a Petition for Review titled Lower Merion School District v. R.C., a minor, by and through his parent and natural guardian, J.C., remove that action to this Court. This Notice is being filed within 30 days of service upon the defendants of the process and pleadings in the Commonwealth Court action, pursuant to 28 U.S.C. § 1446(b). A copy of the process and pleadings served on the defendants in the Commonwealth Court action is attached as Exhibit "A". A Hearing Officer decision may be appealed with 90 days to federal court, pursuant to 20 U.S.C. § 1415(i)(2)(B).. Petitioner is within 90 days of that decision, made on August 6, 2011. The grounds for removal are as follows:

1. Defendant J.C. and her son, R.C., reside at 203 Delmont Avenue, Ardmore, Pennsylvania 19003. The principal offices of the Lower Merion School District are at 510 Bryn Mawr Avenue, Bala Cynwyd, Pennsylvania 19004.

2. R.C., is a special education student in the Lower Merion School District. This action arose when Defendant J.C. filed, on November 12, 2010, for a due process hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f), to contest the implementation of R.C.'s Individualized Educational Plan (IEP) and R.C's placement by the Lower Merion School District into Instructional Support Lab (ISL). The parent's claims arose under the Individuals with Disabilities Education Act, 20 U.S.C. §§1400, et seq. and specifically, §§1412(a)(1), 1412(a)(5), 1414(d), and 1415; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and 34 C.F.R. §104.4; Americans with Disabilities Act, 42 U.S.C. §§12101, et al and 12182; and applicable state statutes implementing the federal regulations, PA Code Chapter 14 and 15.

3. A hearing was held before a Hearing Officer appointed by the Pennsylvania Office of Dispute Resolution, concluding on June 14, 2011. On August 6, 2011, the Hearing Officer ruled in favor of the parent and issued four orders:

- a. The District must provide 2 hours of compensatory education for each day that Student attended school in the 2010-11 school year.
- b. The compensatory education hours are subject to the specific conditions and limitations that Student's parent has the discretion to decide how the hours are spent but the costs to the District of providing the awarded hours must not exceed the full cost of the services that were denied.
- c. The District must convene within 20 days to determine the Student's placement for the 2011-12 school year and to identify individuals to whom Student will have access if conflict or disciplinary incidents arise.
- d. The District is not ordered to take any further action.

4. The Hearing Officer based her decision almost exclusively on federal law, namely the Individuals with Disabilities Act and its implementing regulations:

- a. The Hearing Officer's decision that the Parent's claims for the 2009-10 school year could not be dismissed on the basis of the previous settlement agreement cited federal case law, I.K. ex. rel. B.K. v. School District of Haverford Township, 2011 WL 1042311 (E.D. Pa. March 21, 2011) and L.M. v. Lower Merion School District, 2011 WL 71442 (E.D. Pa. Jan. 7, 2011).
- b. The Hearing Officer's decision determining whether Student was provided with Free Appropriate Public Education (FAPE) from November 2009 to the end of the 2009-10 year was based on the record pursuant to the requirement of the Individuals with Disabilities Education Act that states provide a "free appropriate public education." 20 U.S.C. § 1412 as interpreted by Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999).
- c. The Hearing Officer's decision determining whether J.C. was deprived of the opportunity to meaningfully participate in the decisions about Student's educational program was based on 20 U.S.C. § 1415(f)(3)(E) and 34 C.F.R. § 300.513(a)(2) as interpreted by Winkelman v. Parma City School District, 550 U.S. 516, 530 (2007).

5. The Hearing Officer based a portion of the decision on the Pennsylvania special educational regulations implementing the Individuals with Disabilities Education Act set forth in 22 Pa. Code § 14.101 et. seq.:

- a. The Hearing Officer's decision that R.C. had been improperly placed in Instructional Support Lab (ISL) without consideration of placing him in a regular classroom setting was based on the least restrictive environment requirements set forth in 22 Pa. Code § 14.145.

6. The Pennsylvania special education regulations were intended to satisfy the requirements of the Individuals with Disabilities Education Act and incorporate the Federal regulations by reference. 22 Pa. Code § 14.102 ("The purposes of this chapter are ... (1) To adopt Federal regulations by incorporation by reference to satisfy the statutory requirements under the Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400-1419").

7. The Hearing Officer cited to the Individuals with Disabilities Education Act's "least restrictive environment" provision set forth in 20 U.S.C. § 1412(a)(5), as interpreted by in T.R. v. Kingwood Township Board of Education, 205 F.3d 572, 578 (3d Cir. 2000) and Oberti v. Board of Education of Clementon School District, 995 F.2d 1204, 1205 (3d Cir. 1993), in the section of her decision stating the legal basis of her findings.

8. On September 6, 2011, the Lower Merion School District filed a Petition for Review of the Hearing Officer's decision in the Commonwealth Court of Pennsylvania, seeking reversal of the Hearing Officer's decision to award R.C. with two hours of compensatory education for 2010-11 year. Such appeals of due process hearing decisions are authorized by the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2)(A), which provides that "any party aggrieved by the findings and decision [of a impartial due process hearing], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."

9. The Petition for Review only cites to a line of federal cases in its assertion that the Hearing Officer failed to require the Parent to prove that R.C. could be appropriately educated in a less restrictive environment than was offered. Exh. A at ¶11.

10. From the Hearing Officer's decision, it is evident that this case arises under the laws of the United States, specifically the Individuals with Disabilities Act and its implementing regulations, and that the Petition for Review filed by the Lower Merion School District seeks to further adjudicate those claims arising under federal law, pursuant to 20 U.S.C. § 1415(1)(2)(A). This Court has jurisdiction over this civil action. See Pocono Mountain School District v. T.M., 2009 U.S. Dist. LEXIS 129637 at \* 6, \*9-\*10 (M.D. Pa. Mar. 23, 2009).

Dated: September 22, 2011

Respectfully submitted,

By: /s/ Sonja D. Kerr

Sonja D. Kerr, Pa. Bar No. 95137

Public Interest Law Center of Philadelphia

1709 Benjamin Franklin Parkway, 2nd Floor

Philadelphia, PA 19103

Phone: 215-627-7100

Fax: 215-627-3183

Email: skerr@pilcop.org

**CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2011, I served copies of the foregoing Notice of

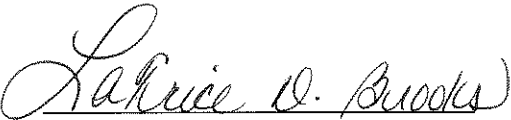
Removal upon the following:

**First Class Mail**

Amy T. Brooks, Esquire  
Wisler Pearlstine, LLP  
Blue Bell Executive Campus  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422

**Via Hand Delivery**

Commonwealth Court Filing Office  
Philadelphia Filing Office  
Widener Building, Suite 990  
1339 chestnut Street  
Philadelphia, PA 19107

  
LaTrice D. Brooks

# Wisler Pearlstine, LLP

*Received 9/09/11*

Blue Bell Executive Campus  
460 Norristown Road, Suite 110  
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Amy T. Brooks  
[abrooks@wispearl.com](mailto:abrooks@wispearl.com)

September 6, 2011

Pennsylvania Judicial Center  
601 Commonwealth Avenue, Suite 2100  
P.O. Box 69185  
Harrisburg, PA 17106-9185

Via First Class Mail

**RE:** Lower Merion School District v. Richard C.  
Petition for Review: ODR # 01784-1011KE

Dear Sir or Madam:

I enclose for filing an original and two copies of the Lower Merion School District Petition for Review of the Special Education Hearing Officer's decision in the above-referenced matter. Please file the original and two copies, and please time-stamp the third copy and return it me in the enclosed self-addressed stamped envelope. I enclose the filing fee of \$73.50.

If you have any questions or need any additional information, please do not hesitate to contact me.

Respectfully Submitted,

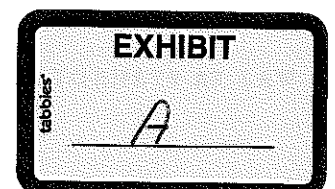


AMY T. BROOKS

ATB/rd

Enclosures

cc: Sonja D. Kerr, Esquire, (w/encl.)  
Linda Kelly, Esquire, Office of Attorney General (w/encl.)  
Ronald Tomalis, Secretary of Education (w/encl.)  
Dr. Michael Kelly, Assistant Superintendent (w/encl.)  
Dr. Barbara Shapiro, Director of Student Services (w/encl.)  
Kenneth A. Roos, Solicitor (w/encl.)



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. \_\_\_\_\_

LOWER MERION SCHOOL DISTRICT  
Petitioner

v.

R. C., a Minor, by and through  
His Parent and Natural Guardian,  
J. C.

Respondents

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PETITION FOR REVIEW  
OF AUGUST 6, 2011 DECISION AND ORDER  
OF THE SPECIAL EDUCATION HEARING OFFICER,  
DEPARTMENT OF EDUCATION,  
COMMONWEALTH OF PENNSYLVANIA  
ODR# 01784-1011KE

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WISLER, PEARLSTINE, LLP

AMY T. BROOKS, ESQUIRE  
KENNETH A. ROOS, ESQUIRE  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422  
(610) 825-8400  
Attorneys for Petitioner  
Lower Merion School District



## I. INTRODUCTION

The Lower Merion School District (“the District”) seeks review of the order of the Special Education Due Process Hearing Officer’s finding that the District did not provide R. C. (“Student” or “R.C.”) with an appropriate education for the 2010-2011 school year and awarding the Student compensatory education. During the time of the hearing, R.C. was a sixth grade student who was enrolled in and attended school in the District since kindergarten. He continues to attend school in the District through the present. R.C. was identified as a student with a specific learning disability and a speech and language impairment. The District provided services to him through an individualized educational program (“IEP”).

In fifth grade, as determined by R.C.’s IEP team and agreed to by his mother, R.C. received four hours of special education outside of the regular education classroom during the school day and was included with his peers for two and a half hours of the day. In the fall of 2010, as a result of two meetings before school began, R.C. was fully mainstreamed and provided his educational program in regular education classrooms with either a special education teacher or a paraprofessional. He received twenty-five minutes of reading instruction before the school day started and speech and language at other times throughout the day. For the 2009-2010 school year, J.C. (“Parent”) argued that the program was inappropriate and requested compensatory education. For the 2010-2011 school year J. C. (“Parent”) argued that the District failed to provide the Student education in the regular education classroom with sufficient supplementary aids and services and requested as relief that either R.C. receive his education in the regular education classroom or he receive his education at a private school or receive private services through an IEP. The Hearing Officer found in favor of the District for the 2009-

2010 school year and in favor of the Parents, in part, for the 2010-2011 school year. The District appeals to the Commonwealth Court.

**II. BASIS FOR JURISDICTION OF THE COURT**

1. The Commonwealth Court has jurisdiction to consider this Petition for Review under 34 C.F.R. § 300.516; 22 Pa. Code §14.162(o); 22 Pa. Code § 15.8(d); and 42 Pa. C.S.A. § 763(a) and under procedures outlined in Pa. R.A.P. Rule 1501.

**III. PARTIES SEEKING REVIEW**

2. The Lower Merion School District seeks review of this order.

**IV. GOVERNMENT UNIT THAT MADE THE DETERMINATION SOUGHT TO BE REVIEWED**

3. The government unit that made the determination at issue was the Pennsylvania Department of Education through Special Education Hearing Officer Cathy A. Skidmore, Esquire.

4. The Department of Education is a disinterested party in the subject matter of the Order.

5. The real party in interest and proper Respondent is J. C., the parent of R. C..

**V. ORDER SOUGHT TO BE REVIEWED**

6. The August 6, 2011 Order sought to be reviewed states, “The District did not provide FAPE to student during the 2010-2011 school year,” and requires the District “to provide, 2 hours of compensatory education for each day that Student attended school [for the 2010-2011 school] year.” The Order specifies conditions and limitations for the compensatory education hours. Further, the Order states that the IEP team shall reconvene “within twenty (20) days of the date of this Order, and make the requisite

determinations about Student's placement for the 2011-2012 school year, and to identify the individuals to whom Student will have access when conflict or disciplinary incidents arise, consistent with the foregoing discussion." A copy of the Hearing Officer's Decision and Order is attached hereto as Exhibit "A".

## **VI. STATEMENT OF OBJECTIONS**

7. The Hearing Officer erred in concluding that the District did not provide FAPE to student during the 2010-2011 school year and in concluding that the District discriminated against R.C..

8. The Hearing Officer erred in finding that Student was entitled to any compensatory education.

9. The Hearing Officer incorrectly decided issues and ordered a remedy outside of the scope of the complaint, which did not request compensatory education for the 2010-2011 school year, but rather requested only a change of the offered program and placement for the 2010-2011 school year.

10. The Hearing Officer incorrectly awarded compensatory education for a denial of FAPE for the 2010-2011 school year by disregarding the parent's waiver of their claim for denial of FAPE. Parent admitted R.C. received FAPE by stating in her closing brief on page 49, "**Ricky Succeeded in Regular Sixth Grade Despite LMSD's Limited Efforts.** The evidence shows that R.C. obtained meaningful benefit in sixth grade..."

11. The Hearing Officer improperly failed to require the Parent to prove as required by *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005); *L.E. v. Ramsey Bd. of Educ.* 435, F.3d 384 (3d Cir. 2006) and *Oberti v. Bd. of Educ. of Borough of Clementon Sch.*

*Dist.*, 995 F.2d 1204, 1213 (3d Cir. 1993) that R.C. could be appropriately educated in a less restrictive environment than was offered.

12. The Hearing Officer incorrectly awarded compensatory education by improperly placing the burden of proof on the District to demonstrate the District's offered program was the least restrictive environment. She found there was a lack of evidence of what supports were in place despite evidence to the contrary.

13. The Hearing Officer incorrectly awarded compensatory education by concluding that "there was no evidence that the IEP team truly considered whether Student could, with supplementary aids and services, successfully be educated within the regular classroom." (*See Exhibit A*, p. 22). This is directly contradicted by her findings that, during the 2010-2011 school year, "It was also determined that Student would be in all regular education classes and supported by either a special education teacher or instructional assistant in the classroom" and "in addition to having co-taught classes or an instructional assistant, Student was supported in academic classes through modification of assessments and homework, extended time on assessments, modified texts and books on tape, and instructional strategies such as chunking of material. Student's regular education teachers collaborated regularly with Student's special education teachers to determine what should be modified and how." (*See Exhibit A*, p. 9, 14).

14. The Hearing Officer improperly failed to decide whether R.C. could be appropriately educated in all regular education classrooms. Instead she improperly required the IEP team to reconvene to consider the issue.

15. The Hearing Officer incorrectly expanded the remedy to include the time period beyond the December 28, 2010 date of the filing of the complaint.

16. In the alternative, if this Court finds that expanding the scope of the complaint to include the time period after the December 28 filing was proper, the Hearing Officer incorrectly excluded consideration of the appropriateness of the proposed program and placement in the January 2011 IEP when finding that the District did not provide FAPE for the entire 2010-2011 school year.

17. The Hearing Officer improperly awarded two hours of compensatory education including instruction in reading even though she found him to have increased from a 1.9 to a 5.6 grade equivalent in word attack and significant growth in spelling, plus he received an A in Language Arts Writing, Language Arts and Social Studies.


**VII. RELIEF SOUGHT**

**WHEREFORE**, Petitioner, the Lower Merion School District, requests that this Honorable Court reverse the portion of the August 6, 2011 Decision and Order of the Special Education Hearing Officer finding in favor of the Parents .

Respectfully submitted,

**WISLER, PEARLSTINE, LLP**

BY: \_\_\_\_\_

  
**AMY T. BROOKS, ESQUIRE**  
**KENNETH A. ROOS, ESQUIRE**  
Attorney ID Nos. 200196/41508  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422  
(610) 825-8400  
Attorneys for Petitioner  
Lower Merion School District

**CERTIFICATE OF SERVICE**

I hereby certify that on September 6, 2011 I served the foregoing Petition for Review upon the persons and in the manner indicated below:

Service by First Class Mail addressed as follows:

Sonja D. Kerr, Esquire  
Public Interest Law Center of Philadelphia  
1709 Benjamin Franklin Parkway  
Second Floor  
Philadelphia, PA 19103

Service by Certified Mail, Return Receipt Requested:

Linda Kelly, Esquire (717)787-3391  
Pennsylvania Office of Attorney General  
Strawberry Square  
16<sup>th</sup> Floor  
Harrisburg, PA 17120

Service by Certified Mail, Return Receipt Requested

Ronald Tomalis, Secretary of Education (717) 787-5820  
Commonwealth of Pennsylvania  
Department of Education  
333 Market Street  
Harrisburg, PA 17126

**WISLER, PEARLSTINE, LLP**

BY: 

**AMY T. BROOKS, ESQUIRE**  
**KENNETH A. ROOS, ESQUIRE**  
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460 Norristown Road, Suite 110  
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Attorneys for Petitioner  
Lower Merion School District

PENNSYLVANIA  
SPECIAL EDUCATION HEARING OFFICER

Cathy A. Skidmore, P. O. Box 12773, Pittsburgh, Pennsylvania 15241  
(717) 649-8261 (phone) (724) 941-3189 (fax) [cskidmore@pattan.net](mailto:cskidmore@pattan.net) (email)

August 6, 2011

Ms. June Coleman  
203 Delmont Avenue  
Ardmore, PA 19003

Sonja D. Kerr, Esquire  
Public Interest Law Center of Philadelphia  
1709 Benjamin Franklin Parkway, 2d Floor  
Philadelphia, PA 19103

Dr. Barbara Shapiro  
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Lower Merion School District  
510 Bryn Mawr Avenue  
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Amy T. Brooks, Esquire  
Wisler Pearlstine, LLP  
Blue Bell Executive Campus  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422

Dear Parties and Counsel:

Enclosed is my decision for Richard Coleman, ODR File No. 01784-1011KE. You may appeal this decision as outlined in the Appeal Timelines and Instructions for Completing Assurance Forms enclosed with this letter.

The local education agency is responsible for implementing this decision. Therefore, any questions regarding implementation should be discussed and resolved between the parties.

The Bureau of Special Education has general supervisory authority over local education agencies and is responsible for ensuring that hearing officer decisions are implemented. In accordance with that requirement, the Superintendent of the local education agency is required to complete the enclosed assurance form, attesting to the fact that the decision has been fully implemented. Specific instructions are enclosed with the assurance form.

Following receipt of the local education agency's completed assurance form or at the expiration of the timelines explained in the enclosed instructions, the Office for Dispute Resolution Case Manager will contact the parent/guardian to verify that the actions required pursuant to this decision have been implemented.

**Exhibit A**

Questions concerning this letter may be directed to the assigned Case Manager or Dispute Resolution Coordinator at the Office for Dispute Resolution, at 1-800-222-3353.

Very truly yours,

*Cathy A. Skidmore*

Cathy A. Skidmore, M.Ed., J.D.  
Hearing Officer

Enclosures: Hearing Decision, Assurance Form, and Appeal Timelines and Instructions for  
Completing Assurance Forms

cc: Office for Dispute Resolution



PENNSYLVANIA  
SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: Richard Coleman

Date of Birth: March 8, 1999

Dates of Hearing:  
February 23, 2011, March 31, 2011, April 7, 2011,  
May 9, 2011, June 2, 2011, June 14, 2011

CLOSED HEARING

ODR File No. 01784-1011KE

Parties to the Hearing:

Ms. June Coleman  
203 Delmont Avenue  
Ardmore, PA 19003

Lower Merion School District  
510 Bryn Mawr Avenue  
Bala Cynwyd, PA 19004

Representative:

Sonja D. Kerr, Esquire  
Public Interest Law Center of  
Philadelphia  
1709 Benjamin Franklin Parkway,  
Second Floor  
Philadelphia, PA 19103

Amy T. Brooks, Esquire  
Wisler Pearlstine, LLP  
Blue Bell Executive Campus  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422

Date Record Closed:

July 25, 2011

Date of Decision:

August 6, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## INTRODUCTION AND PROCEDURAL HISTORY

R.C. (hereafter Student)<sup>1</sup> is a middle school-aged student in the Lower Merion School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parent filed a due process complaint against the District in November 2010, asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,<sup>3</sup> as well as the federal and state regulations implementing those statutes, for the 2009-10 and 2010-11 school years. The Parent was subsequently permitted to amend the complaint which provided clarification to, but did not expand, her claims.<sup>4</sup>

The case proceeded to a due process hearing which convened over six sessions, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with FAPE in the least restrictive environment throughout the time period in question. The District maintained that its special education program, as offered and implemented, was appropriate for Student. Of further significance was the admission of a settlement agreement dated November 18, 2009 which, according to the District, precluded any claim for the 2009-10 school year. As remedies, the Parent requested two hours of compensatory education for each school day during the 2009-10 school year from November 19, 2009 forward, and for each school day during the 2010-11 school year; she also requested certain declaratory relief.<sup>5</sup> The record closed on July 25, 2011 upon receipt of the parties' written posthearing submissions.<sup>6</sup>

For the reasons set forth below, I find in favor of the Parent on a portion of the claims and in favor of the District on a portion of the claims.

## ISSUES

1. Whether Student was denied a free, appropriate public education in the least restrictive environment over the 2009-10 school year from November 18, 2009 forward;
2. Whether Student was denied a free, appropriate public education in the least restrictive environment over the 2010-11 school year;

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>3</sup> 29 U.S.C. § 794.

<sup>4</sup> Hearing Officer Exhibit (HO) 2; Joint Exhibit (JE) 122A.

<sup>5</sup> Parent's Post Hearing Submission at 75-76.

<sup>6</sup> For a variety of reasons, counsel for the Parent requested, and the parties were granted, several brief extensions of time within which the parties would submit their written summations. HO 7, 8, 9, 10. The decision due date was also thereby extended. *Id.*

3. If Student was denied a free, appropriate public education, is Student entitled to compensatory education and, if so, in what amount;
4. Whether the District should be ordered to hire an outside consultant to provide training to its staff at the middle school Student attends; and
5. Whether the District should be ordered to provide a written apology to the Parent for an incident that occurred on September 14, 2010 at the middle school Student attends.

### **FINDINGS OF FACT**

#### **Background**

1. Student is a middle school-aged student who resides within the District and attends one of its middle schools. Student is eligible for special education by reason of a specific learning disability and a speech/language impairment. (Notes of Testimony (N.T.) 15-16)
2. Student has a history of developmental delay and was provided with early intervention services. Student has attended school in the District since kindergarten at which time Student was determined to be eligible for special education on the basis of a specific learning disability. (Joint Exhibit (JE) 1)
3. The District evaluated Student in May 2008 and issued a Re-evaluation Report (RR). Cognitive assessment using the Wechsler Intelligence Scale for Children – Fourth Edition reflected widely variable composite scores with overall results generally lower than previous testing in May 2005. The Wide Range Assessment of Memory and Learning – Second Edition revealed weak auditory memory skills. (N.T. 886; JE 1)
4. The RR also reported results of an administration of the Wechsler Individual Achievement Test – Second Edition, with scores in the borderline to low average range in reading, mathematics, spelling, and written expression. It was suggested that Student needed to develop memory skills as well as basic reading, writing, and mathematics skills, and to improve readiness skills (improving frustration tolerance and attention). (JE 1)
5. Behavioral information in the RR reflected that Student demonstrated difficulty with peer interactions, transitions, acclimating to new situations, and communicating ideas and needs, and exhibited impulsivity and attention-seeking behavior. (JE 1)
6. A speech and language assessment conducted as part of the RR revealed strengths in the areas of receptive language, listening comprehension, and problem-solving, and weaknesses in expressive language as well as some higher level language (sequencing, inferring, and predicting) skills. (JE 1)

## 2009-10 School Year

7. During the summer and fall of 2009, Student was provided with Lindamood-Bell reading instruction at a Lindamood-Bell Learning Center at District expense. Student was also provided with twelve weeks of mathematics instruction at the same Lindamood-Bell Learning Center, after school, at District expense. (N.T. 76-78, 86-87, 1282, 1582, 1585-87; JE 9, JE 13, JE 30, JE 134)
8. The Lindamood-Bell mathematics program is a sequential, student-led, inquiry-based approach which uses visual imaging and manipulatives. (N.T. 1577-81)
9. At the end of the summer of 2009, the Lindamood-Bell Learning Center assessed Student utilizing a variety of instruments which had also been administered before Student began instruction there. Those assessments including the Woodcock Reading Mastery Test (WRMT), Slosson Oral Reading Test, Gray Oral Reading Test – Fourth Edition (GORT-4), and the Test of Mathematical Ability. (JE 30, JE 134)
10. An Individualized Education Program (IEP) was developed in August and September 2009 for the 2009-10 school year (fifth grade). This IEP set forth present levels of academic achievement and functional performance; academic strengths including listening comprehension and articulation skills; needs in the areas reading, spelling, written expression, oral expression, mathematics computation and problem solving, and development of memory strategies. The team determined that a SETT meeting would be held in October 2009 to explore Student's technology needs.<sup>7</sup> (JE 12)
11. The fall 2009 IEP contained goals addressing memory strategies; determining word meaning and demonstrating understanding of word meaning on grade level words; reading, including decoding and fluency as well as phonics; spelling; mathematics computation; mathematics problem solving; and written expression. Modifications and specially designed instruction (SDI) included a word notebook (similar to a personal dictionary); a systematic, sequential, multisensory reading program; a multisensory mathematics program with drill and practice; organization; graphic organizers; and testing/assessment accommodations. There was also an item of SDI for self-advocacy to encourage Student to seek assistance from a peer or adult when needed, and when a conflict arose, Student would "conference with the learning support teacher or speech therapist to facilitate a resolution." (JE 12 at 39) Student was also to receive speech/language therapy as a related service twice each week for thirty minute sessions. The IEP team determined that additional assessments would be conducted to determine Student's academic levels and that Student's IEP goals and objectives would be revisited. (JE 12)

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<sup>7</sup> "The SETT Framework is a guideline for gathering data in order to make effective assistive technology decisions. The SETT Framework considers first, the STUDENT, the ENVIRONMENT(S) and the TASKS required for active participation in the activities of the environment, and finally, the system of TOOLS needed for the student to address the tasks." National Center to Improve Practice, retrieved from [http://www2.edc.org/NCIP/workshops/sett/SETT\\_Framework.html](http://www2.edc.org/NCIP/workshops/sett/SETT_Framework.html) (last visited August 2, 2011).

12. At the second IEP meeting in the fall of 2009, the team agreed that Student would be provided with Lindamood-Bell mathematics instruction once Student's teacher was trained in that program. (JE 12; JE 18)
13. The Parent approved the IEP as revised in September by a signed Notice of Recommended Educational Placement (NOREP) on November 16, 2009. The NOREP states that Student would "be instructed in the Linda Mood [sic] Bell Methodology" and that two hours of reading instruction would be provided each day, as would On Cloud Nine math. (JE 18)
14. On November 18, 2009, the parties executed a settlement agreement resolving the Parent's claims that the District had denied Student FAPE with respect to extended school year (ESY) services over the summer of 2009 as well as the beginning of the 2009-10 school year. The agreement provided for a waiver by the family of any claim that the 2009-10 educational program was not appropriate unless the family gave written notice and requested a change in placement; however, the agreement also stated that it did not limit disputes arising after the date of the agreement. (JE 19)
15. In November of the 2009-10 school year, in oral reading fluency, Student was reading 64 correct words per minute at the fifth grade level using the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), and 70 words correct per minute at the fifth grade level using Read Naturally. Using the WRMT, Student's reading comprehension was at a fourth grade level. (N.T. 1287, 1289-91; JE 55 p. 2)
16. To instruct Student in reading during the 2009-10 school year, the District used the Lindamood-Bell Visualizing and Verbalizing program, the Lindamood-Bell Seeing Stars program, and components of the Wilson Reading Program. The special education teacher who instructed Student in reading was trained in both Lindamood-Bell and Wilson programs. The Wilson components were used to address phonics needs (decoding r-controlled vowels). Of the two hours of individual reading instruction, approximately 45 minutes of instruction using the Visualizing and Verbalizing was provided each day. (N.T. 1278-82, 1293-94, 1300-07, 1415-21, 1433-35, 1438, 1519-20; JE 96)
17. The IEP team discussed using components of the Wilson Reading Program in the fall of 2009, but the Parent was never told that it would not be providing only Lindamood-Bell programming to address Student's reading needs. (N.T. 1418-20, 1438-42, 1550-53, 1746-47)
18. Progress monitoring in the first trimester of the 2009-10 school year reflected that Student was demonstrating improved implementation of memory strategies compared to the baseline; improved use of word analysis strategies and word meaning; increased accuracy in spelling grade level words from 60 to 79-90%; increased accuracy in correctly identifying r-controlled vowels; and increased accuracy in telling time to 5-minute intervals and identifying coins. In other language skills, Student was beginning to identify words relating to given grade level words. In reading fluency, Student increased words correct per minute on cold readings of below grade level passages to 86-102 with 0 or fewer errors (from a baseline of 88), of fourth grade level passages to 65-79 with 2

errors (from a baseline of 54), and of grade level passages to 65-70 with 3 or fewer errors (from a baseline of 54) with a goal of 124 words correct per minute at grade level with 3 or fewer errors. (N.T. 1309-22; JE 20, JE 33)

19. At the beginning of January 2010, the Lindamood-Bell Learning Center assessed Student again using a variety of instruments. On the WRMT, Student's standard scores were essentially the same compared to August 2009, reflecting a grade equivalency of 4.6. (JE 30)
20. Beginning in January 2010, the District began providing Student with the Lindamood-Bell On Cloud Nine mathematics program after the teacher completed the training. Student was provided with individual instruction for one hour each day. The teacher also used components of other mathematics programs as well as strategies to teach time and money skills. (N.T. 1575-81, 1585-96, 1660-63, 1665-66, 1671-73, 1718-20)
21. Student's IEP team met again in January 2010 to determine what goals and objectives would be addressed in Student's 2010 ESY program. The team concluded that Student needed ESY services addressing mathematics computation, spelling, reading fluency, sight word identification, and expressive language skills, as well as Student's ability to follow three-step directions. Student would be provided reading and mathematics instruction for a total of 120 minutes per day, five days each week, for an eight week period using Lindamood-Bell programs. Speech/language therapy was to be provided once per week. (JE 31)
22. Student was provided with private math tutoring twice per week for a three month period during the spring of 2010. (N.T. 97-99, 193; JE 133)
23. In February 2010, the District advised all parents of students who would be entering the middle school where Student attends that a new thematic, interdisciplinary program (IP) would be offered. This IP incorporates artistry and theatre into the regular sixth grade curriculum. The IP encompasses four of ten subject areas: Social Studies, Science, and two Language Arts classes. Interested students and their parents were required to attend an informational meeting in order to apply to the program, and acceptance would be determined through a lottery. (N.T. 452-53, 764-66, 768-70, 819-20; JE 93, JE 94, JE 105)
24. The Parent attended two informational meetings about the IP, and Student applied for and was accepted by the lottery process into that program for the fall of 2010. (N.T. 103-05; JE 107)
25. Progress monitoring in the second trimester of the 2009-10 school year reflected that Student demonstrated improved implementation of memory strategies compared to the baselines and first trimester; maintained essentially stable performance from the first trimester in probes on use of word analysis strategies and word meaning; maintained accuracy in spelling grade level words while demonstrating the ability to define those spelling words or use them in a logical sentence; and maintained accuracy with respect to identifying vowel sounds including r-controlled vowels. In other language skills, Student

showed improvement in generating word lists related to a given grade level word from content area materials, and started to work on writing grade level words in a sentence. Student began to work on solving addition, subtraction, and basic multiplication problems, improving accuracy in addition and subtraction when compared to the baseline. In reading fluency, Student's most recent probes of words correct per minute on cold readings of below grade level passages remained essentially stable from the first trimester, and improved slightly both on fourth grade level passages (up to 76-83 with 1 error from 65-79 in the first trimester with similar number of errors), and on grade level passages (up to 65-82 with 2 errors from 65-70 in the first trimester) with a goal of 124 words correct per minute at grade level with 3 or fewer errors. (JE 33)

26. The Parent and District agreed to an independent educational evaluation (IEE) which was completed in March 2010. The evaluator summarized Student's educational records in great detail. Assessments she conducted were the Burns/Roe Informal Reading Inventory and subtests from the Woodcock Johnson Tests of Achievement – Third Edition; she also had Student compose a one-paragraph writing sample. This evaluator concluded that, consistent with Student's IEPs, Student struggled with reading speed and fluency, spelling, mathematics computation and problem solving including word problems, and written expression. (N.T. 912, 915-16; JE 38)
27. The independent evaluator concluded that Student's most recent IEP was appropriate. However, she also made several recommendations for Student's program, including continuation of learning support for reading, writing, and mathematics in individual or small group instruction, and reading instruction as well as content area materials at the fourth grade level. She also made a number of suggestions on teaching reading and other language arts skills to Student. (JE 38)
28. In the spring of 2010, a meeting of Student's IEP team convened to discuss Student's transition to middle school. (N.T. 106, 453-54, 457, 481, 599-606, 826, 834; JE 88)
29. A comparison of score on the Group Reading Assessment and Diagnostic Evaluation (GRADE), a standardized, norm-referenced test of reading achievement,<sup>8</sup> administered in fall 2009 and spring 2010 reflected that Student had improved in almost all competency areas: Sentence Comprehension, Passage Comprehension, the Comprehension Composite, and Vocabulary. The score on Listening Comprehension remained stable, with all GRADE scores in the average range in the spring of 2010. Grade equivalency was determined to be 5.0 in Vocabulary, 7.9 on the Comprehension Composite, and 6.4 on the Total Test (up from 3.8 in the fall of 2009). (N.T. 1510-11; JE 78 at 16)
30. A comparison of the Group Mathematics Assessment and Diagnostic Evaluation (GMADE) assessment, a standardized, norm-referenced test of math skills,<sup>9</sup> in September 2009 and June 2010 reflected that Student increased the standard scores in Concepts and Communications from 65 to 96; in Operations and Computation from 62 to 86. Standard

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<sup>8</sup> John Salvia, James E. Ysseldyke & Sara Bolt, *Assessment in Special and Inclusive Education* at 203 (11<sup>th</sup> ed. 2010).

<sup>9</sup> *Id.* at 211, 214-15.

scores in Process and Application remained stable at 90, while the Total Test Score increased from 76 to 87. Student's grade equivalency was determined to be at a 2.8 level in September 2009 and at a 4.1 grade level in June 2010. (N.T. 1715; JE 78)

### Summer 2010

31. The parties convened meetings in February and June 2010 to further discuss Student's ESY program for 2010. For Student's language arts needs, the team considered Lindamood-Bell and the Wilson Just Words program for that summer. Student's ESY program focused on the speech/language, reading, and mathematics goals in the current IEP, with an emphasis on word attack skills and mathematics computation and fluency. The Parent approved the NOREP for ESY for 2010 with two hours of reading and two hours of mathematics instruction each day for eight weeks. Student was provided with the Just Words program that summer, not a Lindamood-Bell program, and Student went from Unit 1 of Just Words at the beginning of the summer to Unit 6. The District did not use the On Cloud Nine program for mathematics but instead focused on the District's mathematics curriculum and building skills to prepare Student for middle school. (N.T. 108, 838, 841-43, 845, 850-54, 956-57, 1328-35, 1357-58, 1497, 1630-44, 1694-98, 1701-02, 1735-36; JE 22, JE 31, JE 34, JE 40, JE 42)
32. The District did not discuss using Just Words instead of Lindamood-Bell for the ESY program in 2010 with the Parent, although she understood components of both would be used during that summer. Various mathematics programs and approaches to Student's ESY program for that subject were also discussed, but the Parent was not told that Student would not be provided with On Cloud Nine. (N.T. 1333, 1472-73, 1481-84, 1638-39, 1699-1701, 1747-48)
33. Progress monitoring for the summer of 2010 revealed somewhat variable scores on the DIBELS at the fourth grade level (ranging from 71 to 130 words correct per minute over the course of the summer, with a goal of 116 with 0 errors), and somewhat more stable scores at the fifth grade level (ranging from 89 to 114 words correct per minute, with a goal of 119 with 0 errors). Graphs of Student's scores including aimlines and trendlines revealed that Student was making better progress on the DIBELS probes of oral reading fluency at the fourth grade level than at the fifth grade level. In reading comprehension at the fourth grade level, Student improved the number of correct responses to reading comprehension questions from a baseline of 10 to a high of 26 at the end of August 2010, meeting the goal of 25. (N.T. 1336-40; JE 41, JE 79)
34. The District conducted additional reading assessments in June and August to compare Student's performance over the summer, and the scores essentially remained stable in many areas. On the Wilson Assessment of Decoding and Encoding (WADE), however, Student showed improvement in word attack skills and was able to identify more consonant and vowel sounds at the end of the summer. Additionally, on the Word Identification and Spelling Test (WIST), Student showed improvement over the summer in reading regular words and spelling both regular and irregular words. (N.T. 1342-45, 1347-49; JE 39, JE 111)



35. The District also assessed Student in mathematics by administering the GMADE in June and August 2010. Student's standard scores in Concepts and Communication increased from 96 to 103 (both in the fifth stanine); in Operations and Computation increased from 86 to 95 (from the third to the fourth stanine); in Process and Applications increased from 90 to 95 (both in the fourth stanine); and the Total Test Score increased from 87 to 96 (from the third to the fifth stanine). The GMADE also provided a grade equivalency for the Total Test score, which went from 4.1 in June 2010 to 5.0 in August 2010. (JE 45 at 19, JE 78 at 14)
36. By the end of the summer, Student was fluent in multiplication facts up through eleven whereas at the beginning of summer Student was only fluent in twos and inconsistent with fours. (N.T. 1735-36, 1738-39)

#### 2010-11 School Year

37. In the middle school, student schedules are generated by a computer program once each student's mathematics level is determined. Personnel review the schedules for students who have IEPs and can make adjustments to the schedule as necessary depending on the student's needs including level of support that is appropriate. (N.T. 469-71, 474, 722-23)
38. Two of the middle school principals are certified special education teachers. (N.T. 234, 270, 719)
39. Another meeting of Student's IEP team convened in August 2010 to, among other things, discuss Student's schedule for the fall and review progress from that summer. The original schedule dated August 25, 2010 did not include a Social Studies class; it did include an Instructional Support Lab (ISL), which is a special education class, with low student-teacher ratios, during which students work on all of the individual goals and objectives in their IEPs. Student also had a Mathematics Supplement class<sup>10</sup> on the schedule, which is a regular education class for students with some gaps or deficits in basic mathematics facts. When the Parent questioned the omission of Social Studies and inclusion of ISL, the District made changes to the schedule so that Student had an IP Social Studies class and ISL was removed. It was also determined that Student would be in all regular education classes and supported by either a special education teacher or instructional assistant in the classroom. (N.T. 105, 110-15, 146-47, 245-46, 473-74, 477, 480-81, 483-85, 551-52, 556-57, 607-10, 628-29, 635, 773, 787-90, 803-05, 854-57, 998-99, 1114-18, 1147-48, 1150-51, 1193, 1201, 1205-06, 1213, 1259-61; JE 43, JE 44, JE 48, JE 50, JE 113)
40. At that same August 2010 meeting, the Parent explained that in elementary school, Student would go to the speech/language therapist or special education teacher whenever any potential disciplinary incidents arose so as to allow for Student to process what was occurring. This strategy was successful for Student in elementary school. The IEP team

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<sup>10</sup> The terms Math Lab and Math Supplement were both used in the record but apparently refer to the same class. (N.T. 483-84, 1144)

agreed to continue that accommodation for Student in middle school. (N.T. 494-97, 698, 830-31, 834-35, 1008-10, 1650-52; JE 44)

41. The team discussed revisions to Student's IEP at that August 25, 2010 meeting, and the IEP team convened again on September 2, 2010 to revise the IEP. The team determined that another SETT meeting would be held in October 2010 to explore Student's technology needs. The team updated Student's present levels to include all assessments conducted over the summer as well as progress monitoring information. Changes were made to the accommodations provided for Pennsylvania System of State Assessment (PSSA) testing. Goals and objectives in the IEP were the same as in the prior IEP except as follows: the goal for reading correct words per minute on a grade level passage increased to 145 (from 124); the spelling goal was revised to reflect the focus on phonics in the Just Words program; the expected accuracy on the goal related to identifying vowel signs increased to 100%; and time and money goals and objectives were removed. This IEP stated that Student would be provided with two hours each day of the Lindamood-Bell Visualizing and Verbalizing program, and another two hours each day of the Lindamood-Bell On Cloud Nine program. The Least Restrictive Environment (LRE) calculation stated that Student would be in special education and outside of regular education classes 2.5 hours each day. (N.T. 611-12, 624-26, 1127-28; JE 45, JE 47, JE 48, JE 50, JE 104<sup>11</sup>)
42. Student's needs continued to be reading (decoding, oral reading fluency, and identification and definition of words), spelling, written expression, oral expression, mathematics computation and problem solving, and development of memory and word analysis strategies. Student also demonstrated a need for direct instruction in study skills, organizational skills, and content development. (N.T. 1119-22, 1125-29, 1362; JE 45, JE 104)
43. As of the first day of the 2010-11 school year, Student had a special education teacher or paraprofessional/instructional assistant assigned to Student's IP and other content area classes. The IP Language Arts and IP Language Arts Writing classes were co-taught by a special education teacher, as was the Mathematics class. (N.T. 670-73)
44. On September 10, 2010, the Parent and District agreed that Student would be provided the Just Words program for 25-30 minutes in the mornings before school started. The Just Words program is typically a 45-minute program. Student worked on sight words, spelling, and word attack skills using Just Words but not comprehension, fluency, or vocabulary. (N.T. 629, 679, 1130, 1163-64, 1184, 1190, 1357-58, 1362; JE 114)
45. At the beginning of the 2010-11 school year, Student had more difficulty focusing than was the case in the summer, possibly due in part to having the Just Words instruction early in the morning. Student also asked the teacher who provided the Just Words

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<sup>11</sup> JE 45 and JE 104 are identical in substantive content. The only differences are that JE 45 includes a billing form that JE 104 does not; and JE 104 has signatures on the Procedural Safeguards Notice and IEP Team/Signatures pages while JE 45 does not. (N.T. 1114; JE 45, JE 104)

instruction for help with work in other classes. This behavior ceased in January or February 2011. (N.T. 1358-60, 1497-1500)

46. On the morning of September 14, 2010 (the third day of the school year), the Parent received two telephone calls from the District advising that Student was not at school that day. The Parent immediately went to the middle school and on the way received another telephone call from the District, this time advising that Student was in the principal's office. After the Parent arrived at the school, she spoke with Student who went on to class. (N.T. 122-24, 594-95)
47. Student was in the principal's office that day because Student and three peers were involved in an incident at the bus stop that morning. Student and the peers met as a group with one of the principals at the middle school. The principals then contacted a school counselor to meet with Student. Student was erroneously determined to be absent from school that day because Student was not in class at the time attendance was taken. (N.T. 210, 216-25, 240-41, 502-03, 533, 700, 739-40, 743, 746-47; JE 53, JE 54)
48. No discipline resulted from the bus stop incident. (N.T. 283-84, 750-51)
49. After Student returned to class, the Parent went into the principal's office and spoke with two of the middle school principals. The Parent was extremely upset, and she and one of the principals had a heated exchange during which both were shouting. At one point, one of the principals suggested that Student should not be in the IP program because Student was not performing at grade level. The Parent agreed at that time to change Student's schedule so that Student would have ISL as well as the Mathematics Supplement class. (N.T. 125-27, 129-31, 194-97, 223, 227-30, 233, 235-37, 254-57, 261, 265-67, 279, 518-19, 523, 526-29, 557-59, 563, 636-38, 653-54; JE 52, JE 54, JE 77 at 9)
50. The principals and the Parent also discussed the provision in Student's IEP that Student be provided with a "go-to" person, either the special education teacher or the speech/language therapist, as Student had had in elementary school. (N.T. 135-38, 240-41, 264-65, 279-80)
51. Late in the evening of September 14, 2010, the Parent wrote an email message to two of the middle school principals revoking her consent to the schedule change made on September 14, 2010, and requesting an IEP meeting. On the morning of September 15, 2010, the Parent sent another email message to the District agreeing to ISL and Mathematics Supplement; but later that morning she again revoked her consent, expressed feeling pressured, and requested an immediate IEP meeting. (N.T. 133-35, 568, 638-40, 648-51; JE 77 at 9, 11-13, JE 116)
52. Student did have ISL and Mathematics Supplement on September 15, 2010, but not again. (N.T. 648, 651, 715, 1144-46)
53. An IEP meeting convened pursuant to the Parent's request on September 24, 2010. The team, including the Parent, discussed the September 14, 2010 incident, and the Parent again became upset. The Parent asked that the principal who attended the meeting as the

LEA be replaced. That principal did not leave the IEP meeting, remaining for the purpose of supporting the staff in the event Student's progress would be discussed, but one of the other principals also arrived and attended. The possibility of Student taking the Mathematics Supplement class twice per cycle was again discussed. (N.T. 569-80, 584-86, 731-33, 771-74, 1093, 1177-79; JE 59)

54. The IEP team also discussed revisions to Student's IEP on September 24, 2010. New information was added to reflect Student's program at the beginning of the 2010-11 school year. Changes were made to Student's PSSA accommodations, and the section on program modifications/SDI was revised to add the before-school Just Words reading instruction as well as to provide for instruction in breaking down long term assignments; and to remove the personal notebook and the Visualizing and Verbalizing and On Cloud Nine programs from the IEP. That SDI section also identified who in the middle school would be implementing some of those. The District proposed a multi-sensory reading program provided thirty minutes each day; ISL, and the Mathematics Supplement class in addition to continued speech/language therapy. The Parent did not approve these changes to the IEP, but apparently did not sign and return the NOREP. (N.T. 1140-44, 1154-64; JE 58, JE 64, JE 65)
55. On October 14, 2010, Student's IEP was revised to set forth more current information. Student's grades were reported: a D in IP Language Arts Writing; Unsatisfactory in Health; Outstanding in Physical Education, Art, and Computers; an A in IP Language Arts Reading; a C in IP Science and Mathematics; an F in IP Social Studies; and Satisfactory in Music Lab and Spanish. This revised IEP also included information about Student's attendance and speech/language therapy at the beginning of the 2010-11 school year. The reading fluency goal was revised from 145 words correct per minute at a fifth grade level to 125 words correct per minute on a sixth grade level; and the vowel identification goal changed the level of accuracy from 100% to 95%. Progress reporting was also stated to be quarterly rather than every trimester as in the elementary school. Finally, in addition to several subtle changes to the program modifications/SDI, the provision for the go-to person when conflict arose added a counselor as a third option. (N.T. 151-53, 1165-68, 1172-76; JE 66)
56. At IEP meetings on September 24 and October 22, 2010, the team discussed Student's lack of homework completion, and the Parent expressed confusion over what Student's homework assignments were. One intervention considered was that Student could go to HAM (Homework and Makeup) Club after school. The Parent did not elect to have Student participate in HAM Club because Student had tutoring after school. The team determined that teachers would, and began to, review and sign Student's assignment book at the end of each class shortly after the October meeting. The Parent also made a request for Student to attend private school. (N.T. 148-50, 155-57, 191-92, 655, 680-82, 777-78, 1016-18, 1061-64, 1099-1100, 1237-39, 1240-44; JE 69, JE 70)
57. Sometime during the fall of 2010, the Parent began exploring private placements for Student. However, the Parent did not locate a private school that she believed would meet Student's needs. (N.T. 155-57, 191-92)

58. In October 2010, the District suggested that Student take the Mathematics Supplement course because of Student's most recent PSSA scores, which is a recommendation for students who meet certain criteria such as low PSSA scores. One of the principals suggested that Student could eliminate Spanish to make room in the schedule for Mathematics Supplement. The Parent did not want Student to drop Spanish class. (N.T. 271-73, 275-76, 1052; JE 67)
59. An administration of the GRADE in the fall of 2010 revealed decreased scores in all areas, all within the third stanine (below average) and all evidencing weaknesses. The teacher who was providing the Just Words instruction believed that Student needed more direct instruction in reading comprehension and overall reading skills. (N.T. 1367-69, 1371-73; JE 84 at 20)
60. Progress monitoring for Just Words as of October 22, 2010 reflected that Student had completed Unit 6 and the first two lessons of Unit 7. On Student's IEP goals, Student's progress reports reflected that Student had mastered the objective to identify all 17 vowel sounds. The District also obtained baseline information on most of Student's other IEP goals and objectives at that time. (JE 55)
61. On October 22, 2010, the team again discussed revisions to Student's IEP, including parental concerns over how Student could have assistance when conflicts arose and the possibility of a private school placement. Student's grades were updated to reflect a D+ in IP Language Arts Writing; Satisfactory in Health, Spanish, and Computers; Outstanding in Physical Education; a B+ in Art; a B in IP Language Arts; a C+ in IP Science; an F in IP Social Studies; Unsatisfactory in Music Lab; and a D in Mathematics. This IEP also included progress toward Student's goals at the time of the meeting, as well as the results of prior PSSA scores. Information from the March 2010 IEE was also added. SDI was changed to set forth Goal-specific SDI as applicable, in addition to appearing in the Program Modifications/SDI section of the IEP. One change to the SDI was that Student would speak to the speech/language therapist, or school counselor, or case manager (in that order) in disciplinary situations. Additionally, new SDI proposed a check of Student's assignment notebook at the end of each class; adapted textbooks in some of the IP classes; increasing Student's individual reading instruction to one 44 minute-period per day in a learning support environment; and the addition of ISL one period per day and Math Supplement class twice per six-day cycle. The Parent disapproved the accompanying NOREP and requested a due process hearing. (N.T. 157, 1175-77, 1180-81; JE 62, JE 68, JE 69, JE 71, JE 72, JE 77 at 30)
62. Student achieved higher WIST scores in January 2011 as compared to August 2010, showing significant growth in spelling (standard scores of 88 (below average) in August 2010 and 105 (average) in January 2011). (N.T. 1353-55; JE 39)
63. During the 2010-11 school year, Student had speech/language therapy twice each week, one small group session in the regular education (IP Language Arts Writing) classroom and one individual session outside of the regular education classroom. (N.T. 996-98, 1165)

64. During the 2010-11 school year, in addition to having co-taught classes or an instructional assistant, Student was supported in academic classes through modification of assessments and homework, extended time on assessments, modified texts and books on tape, and instructional strategies such as chunking of material. Student's regular education teachers collaborated regularly with Student's special education teachers to determine what should be modified and how. (N.T. 1001-03, 1018-21, 1036, 1043-51, 1054-66, 1157-58, 1162-63, 1226-28, 1233-36, 1244-45; JE 28, JE 65, JE 71)
65. During the 2010-11 school year, Student's teachers kept track of Student's homework completion, classwork completion, self-advocacy, on-task behavior and prompts to remain on task, and prompts to enter homework in Student's assignment book. (N.T. 1041-42, 1134-38; JE 51, JE 61)
66. Student tended to become distracted in more unstructured and/or large group settings. Prompting by an aide had been a successful strategy for Student in those situations. (N.T. 1139-40, 1152-53, 1222-23, 1374-77)
67. Student experienced difficulty in the Mathematics class during the 2010-11 school year, including with tests and quizzes, earning a number of failing grades. Student was provided with fifteen minutes of direct instruction by a special education teacher in the regular education Mathematics class each day to work on basic Mathematics skills addressed in Student's IEP, including subtraction with borrowing, multiplication, and division. Reports of Student's progress on basic Mathematics skills in January 2011 as compared to that in March 2010 reflected a sharp decrease in accuracy on subtraction problems with borrowing, some increase in accuracy on multiplication problems, and about the same accuracy on division problems. An objective for solving mathematics word problems was removed at the IEP meeting in October 2010 and Student's progress on that goal was not reported. Student's mathematics homework was further modified after September 24, 2010. (N.T. 1027, 1061, 1069-79, 1083-85, 1089, 1210, 1218-19, 1250-51, 1256-57; JE 56, JE 87 at 4)
68. Student again had private mathematics tutoring twice each week for approximately two months at the end of 2010. (N.T. 118-20)
69. Progress monitoring in January 2011 revealed inconsistency with describing memory strategies and stable or decreasing progress from October 2010 on using context clues for unknown words (speech/language); a slight increase from October 2010 in demonstrating understanding of word meaning/vocabulary, from three to four out of ten at a sixth grade level; approximately level performance in words correct per minute at a sixth grade level from 109 in October 2010 to 100 on the most recent probe (reading fluency); slight improvement in decoding and spelling goals and objectives from the October 2010 baselines; an overall increase in scores on a writing rubric from 1 out of 4 on all domains in October 2010 to a range of 1.5 – 3 across domains in January 2011; approximately level performance on mixed mathematics problems from the October 2010 baseline; and an overall decrease in performance on answering reading comprehension questions from October 2010. (JE 87)

70. A comparison of WRMT grade equivalency in the fall of 2009 and January 2011 reflect improvement in word attack skills from 1.9 to 5.6. (N.T. 1381-82; JE 78)
71. The IEP team convened on January 19, 2011 to develop a new IEP for Student. That IEP was not part of the due process complaint in this case. (N.T. 35, 49, 65, 337-38; JE 84)
72. Student was privately evaluated in January and February 2011 by an educational consultant who is a certified special education teacher, a certified principal, and a certified supervisor of special education in Pennsylvania. She issued an Independent Educational Evaluation (IEE) report. (N.T. 288-89, 322; JE 135, 136)
73. The independent evaluator conducted a number of assessments (WRMT,<sup>12</sup> WADE, a Qualitative Reading Inventory, the GORT-4, and the Key Math Test), from which she concluded that Student was performing below grade level in the areas of reading, math, and written expression. She also observed Student at the middle school in three classrooms (Mathematics, English, and Language Arts Writing). (N.T. 326-27, 408-09; JE 135)
74. The IEE also contained a number of recommendations for Student's program. Those suggestions included instruction using Lindamood-Bell programs for both reading (continuation of Visualizing and Verbalizing, Seeing Stars, and initiation of the Lindamood Phoneme Sequencing Program (LiPS) for phonemic awareness) and mathematics (On Cloud Nine), with discontinuation of Just Words; and removal of the end-of-the-day advisory class from Student's schedule so Student could go to the Lindamood-Bell Learning Center for two hours each day. (JE 135)
75. Additionally, the IEE set forth this evaluator's determinations of Student's areas of need in reading comprehension, written communication, and mathematics, and further explained a number of deficiencies she perceived in Student's IEPs: lack of a functional behavior assessment (FBA) and positive behavior support plan (PBSP) to address Student's behavioral needs, an absence of ESY planning, and goals which, *inter alia*, were not based on Student's instructional level, were too numerous, and failed to focus on the most significant needs. (JE 135)
76. The evaluator also suggested that the District be provided with professional development with respect to differentiating instruction, co-teaching, writing IEPs, FBAs, and PSPBs, and inclusion. (JE 135 at 15)
77. Student's grades for the end of the third quarter of the 2010-11 school year were an A in IP Language Arts Writing, IP Language Arts, and IP Social Studies, Satisfactory in Health, Family & Consumer Science, and Music Lab, Outstanding in Physical Education and Spanish, a D in IP Science, and an F in Mathematics. (JE 82 at 1)
78. The Parent discussed private school with the District elementary supervisor of special education on several occasions during the 2010-11 school year. (N.T. 872-77)

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<sup>12</sup> This evaluator obtained a WRMT grade equivalency score of 5.0 for Word Attack skills.

## DISCUSSION AND CONCLUSIONS OF LAW

### General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);<sup>13</sup> *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. See generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). The credibility of particular witnesses is discussed further in this decision as necessary.

### IDEA Principles

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an

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<sup>13</sup> The burden of production, “i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.



explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

The IDEA further requires that eligible students be educated in the "least restrictive environment" which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000). In *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993), the Third Circuit adopted a two-part test for determining whether a student has been placed into the least restrictive environment as required by the IDEA. The first prong of the test requires a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and the second prong is that, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Id.* In evaluating the first prong, the efforts the school district has made to include the child, a comparison of the benefits to the child of placement in a regular classroom versus a separate special education classroom, and the effect on the other students, must be considered. *Id.*

#### Section 504 Principles

The obligation to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm.w. 2005). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.

*Ridgewood* at 253. "In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability." *Id.* Parents need not, however, establish that the District's alleged discriminatory acts were intentional. *Id.*

#### 2009-10 School Year

The first issue to be addressed is whether the Parent's claims for the 2009-10 school year (after the November 18, 2009 settlement agreement) should be dismissed on the basis of that

agreement. There can be no question that parties may be held to the terms of settlement agreements in special education. However, while one judge the Eastern District of Pennsylvania did recently remand a case to a special education hearing officer to determine whether a valid settlement agreement existed, it did not suggest that the hearing officer also had the authority to enforce any agreement which did exist. *I.K. ex. rel. B.K. v. School District of Haverford Township*, 2011 WL 1042311 (E.D. Pa. March 21, 2011). Furthermore, another judge in the Eastern District has also recently affirmed a hearing officer's dismissal of a complaint based upon a settlement agreement on the basis that the hearing officer lacked jurisdiction over that claim. *L.M. v. Lower Merion School District*, 2011 WL 71442 (E.D. Pa. January 7, 2011). Whether the District might prevail on this argument in a future court action, I conclude that the Parent's 2009-10 claims cannot be dismissed on the basis of the settlement agreement.

This hearing officer does have jurisdiction over claims "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education [(FAPE)] to such child[.]" 20 U.S.C. § 1415(b)(6)(A); *see also* 20 U.S.C. § 1415(f)(1)(A), 34 C.F.R. § 507(a)(1). The Parent alleges that the District denied FAPE to Student from November 19, 2009 (the day after the settlement agreement was executed) to the present; and, she expressly reserved the right to pursue claims after the date of that agreement. (Finding of Fact (FF) 14) Thus, I conclude that I may consider the Parent's claims that the District denied Student FAPE during the 2009-10 school year beginning with the day after the settlement agreement was signed.

The next question is whether Student was provided with FAPE from November 19, 2009 to the end of the 2009-10 school year. Student's needs as identified by the 2008 RR and the fall 2009 IEP were reading, mathematics, and oral and written expression skills, and development of memory strategies. (FF 4, 6, 10) The fall 2009 IEP included goals addressing each of these needs, in addition to speech/language therapy and numerous program modifications and items of SDI. (FF 11) From the start of the 2009-10 school year, Student was provided individualized Lindamood-Bell reading and mathematics instruction. (FF 7, 12, 13, 16) Student also was provided with components of the Wilson Just Words Program to address Student's decoding weaknesses. (FF 16) The teachers providing Student's reading and mathematics instruction were trained in the programs they were using with Student. (FF 12, 16, 20)

Progress monitoring during the first two trimesters of the 2009-10 school year suggested that Student was demonstrating improvement on all of the IEP goals. (FF 18, 25) For example, in oral reading fluency probes, Student increased the number of words correct per minute on fourth grade passages from a baseline of 54 to 76-83 with 2 or fewer errors by the end of the second trimester, and on grade level passages from a baseline of 54 to 65-82 with 3 or fewer errors by the end of the second trimester. (FF 18) While Student had not by then achieved the goal of 124 words correct per minute at grade level, the question is whether the IEP at the time it was drafted was reasonably calculated to offer FAPE, not whether it did. *Fuhrmann, supra*. Student was clearly demonstrating steady improvement toward that goal. (FF 18, 25) A comparison of other reading assessments also indicates that Student's program was addressing Student's needs in that area. Notably, on the GRADE, Student achieved average scores on all of the competency areas in the spring of 2010, with grade equivalency on each competency at the

5.0-7.9 level.<sup>14</sup> (FF 29) In mathematics, another significant area of need, Student's standard scores on most of the areas assessed by the GMADE improved dramatically over the course of that school year. (FF 30) Upon consideration of the record as a whole, the evidence is preponderant that Student did make meaningful educational progress in all areas of identified need during the portion of the 2009-10 school year in question.

The crux of the Parent's concern with the 2009-10 school year is that the District failed to provide two hours a day of Lindamood-Bell reading instruction, which is both contrary to the terms of the November 2009 settlement agreement and a reflection of the District's decision-making without input by the Parent. (Parent's Posthearing Submission at 68-70) Whether or not one of the parties may not have complied with one or more of the terms of the settlement agreement, as explained above, this hearing officer is not charged with the responsibility of enforcing such agreements. The only question is whether Student was denied FAPE. The Lindamood-Bell and Wilson programs are both "systematic, sequential, multisensory approach[es] to reading that includes a high frequency of repetition" as set forth in the fall 2009 and January 2010 IEPs. (JE 31 at 30, JE 45 at 35)<sup>15</sup> The teacher who provided Student's 2009-10 reading instruction testified, quite credibly, that she added components of the Wilson program because the Lindamood-Bell programs which the District was providing did not address Student's decoding needs. (N.T. 1301-03, 1420-21) She also convincingly testified that the programs she used worked well in combination to address Student's specific needs, as well as to ensure that Student was generalizing newly learned skills. (N.T. 1301-03) This hearing officer concludes that the fact that the District used some components of a Wilson program for reading instruction during the 2009-10 school year was not a denial of FAPE, and on the contrary, served to further individualize Student's program as envisioned by the IDEA.

The other contention is that the District not only failed to include the Parent in making this decision, but neglected to let her know that the Lindamood-Bell Visualizing and Verbalizing program would not be provided for two hours each day. There is no question that a major premise of the IDEA is that parents are permitted to participate meaningfully in making educational decisions about their children. Parents play "a significant role in the IEP process." *Schaffer, supra*, at 53. Indeed, a denial of FAPE may exist if there has been an impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which

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<sup>14</sup> There was substantial evidence presented on grade-equivalency on various test instruments. While perhaps easily understandable, these scores "must be interpreted carefully, because they can be misleading[.]" Jerome M. Sattler, *Assessment of Children, Cognitive Foundations* at 104 (5<sup>th</sup> ed. 2008); see also John Salvia, James E. Ysseldyke & Sara Bolt, *Assessment in Special and Inclusive Education* (11<sup>th</sup> ed. 2010). Critically, grade equivalency scores, which are frequently obtained by interpolation and extrapolation rather than on actual scores obtained, "exaggerate small differences in performance" and, further, cannot necessarily be compared between different tests. Sattler at 104-05.

<sup>15</sup> As noted, the November 16, 2009 NOREP states that Student would "be instructed in the Linda Mood [sic] Bell Methodology" and that two hours of reading instruction would be provided each day. (JE 18 at 2)

includes the parents as members, to take into account any “concerns” parents have “for enhancing the education of their child” when it formulates the IEP.

*Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007).

It is more than a little concerning, given how important it was to the parties that Student be provided with Lindamood-Bell instruction, the Parent was not involved in the decision not to provide two hours of instruction using that particular program. (FF 16, 17) The question, then, is whether the Parent was thereby deprived of the opportunity to meaningfully participate in decisions about Student’s educational program. After careful consideration, I conclude that she was not.

The parties held numerous meetings over the course of the 2009-10 school year and were in continuous communication about Student and Student’s program. (FF 10, 12, 17, 18, 21, 24, 25, 28) There were at least three meetings about Student’s reading instruction for the 2009-10 school year and ESY for 2010 in which the Wilson programs were discussed. (FF 12, 17, 21, 31) Thus, the Parent was aware that the District was at least considering other reading programs to address Student’s needs, and she herself was involved in the decision to use Wilson Just Words in addition to Lindamood-Bell programming during the summer of 2010. (FF 31, 32) Further, as noted, the IEPs in question, which the Parent clearly participated in developing, specified a “systematic, sequential, multisensory approach to reading that includes a high frequency of repetition[.]” (JE 31 at 30, JE 45 at 35) Both programs used to for Student’s reading instruction during the 2009-10 school year fit within this description in the IEPs. Further, as set forth above, I have concluded that this decision did not serve to substantively deny Student FAPE. For all of these reasons, I cannot conclude that the Parent’s right to participate meaningfully in Student’s educational program was significantly impeded in this instance such that FAPE was denied in this case.

#### Summer 2010

The next issue is whether Student was denied an appropriate education over the summer of 2010. The IEP team determined what specific needs should be addressed through ESY and concluded that two hours of reading instruction and two hours of mathematics instruction, in addition to weekly speech/language therapy, was appropriate. (FF 31) At this point the Parent did understand that Student would be provided both Lindamood-Bell and Wilson approaches for the reading instruction. (FF 32) The team also discussed using mathematics instruction other than the On Cloud Nine program. (*Id.*)

Student clearly made progress on both reading and mathematics goals over the summer of 2010. Student completed six units of the Wilson Just Words program. (FF 31) In reading, assessments of Student’s oral reading fluency and reading comprehension showed improvement in both areas, with Student attaining the reading comprehension goal and nearly reaching the oral reading fluency goals. (FF 33) Other assessments pointed to improvement in word attack skills, sound identification, and reading and spelling, other areas of need. (FF 34) In mathematics, Student’s standard scores on the GMACE also increased over that 8-week period, with all scores in the fourth and fifth stanines, and Student mastered multiplication. (FF 35, 36)

As with the 2009-10 school year, and for essentially the same reasons, the Parent suggests that she was not permitted to meaningfully participate in Student's educational program for the summer of 2010. For the reasons set forth above, I cannot agree with this contention.

#### 2010-11 School Year

The parties convened several meetings to plan and prepare for Student's entry into middle school. (FF 28, 39, 40, 41) The IEP team was aware that Student would be participating in the IP program, and the Parent made clear that she wanted Student in all regular education classes. (FF 37, 39) The IEP team made a number of changes to Student's schedule, ultimately placing Student in all regular education classes with the support of either a special education teacher or instructional assistant. (FF 39, 40)

The events of September 14, 2010 are extremely unfortunate. (FF 46, 47, 49) Upon consideration of the record as a whole, I am compelled to conclude that the decision of the middle school principals to have Student speak with a school counselor, whom Student knew, rather than a special education teacher or the speech/language therapist who had yet to work with Student, was not unreasonable under the circumstances (N.T. 240-41, 264-65, 502-03, 552, 634-35, 738-40, 927-28)), was an isolated event, and did not constitute a material change to Student's IEP. What is important is that Student was given the opportunity to speak with an adult known to Student in order to process the situation as had successfully been done in elementary school. (FF 47, 50) Thus, the purpose of this item of SDI was served.

On the other hand, that day was certainly not the time to discuss changes to Student's educational program and schedule. Moreover, it is puzzling that, by the third day of school, many District representatives were already convinced Student needed additional special education outside of the regular education classroom through either ISL or Mathematics Supplement or both. (FF 49) It is implausible that this determination could have been made so quickly, particularly since Student had yet to have a full cycle of classes including any sessions with the speech/language therapist.

The Pennsylvania special education regulations implementing the IDEA provide in relevant part as follows.

#### **§ 14.145. Least restrictive environment requirements.**

Students with disabilities shall be educated in the least restrictive environment. Each school entity shall ensure that:

- (1) To the maximum extent appropriate, and as provided in the IEP, the student with a disability is educated with nondisabled peers.
- (2) Special classes, separate schooling or other removal of a student with a disability from the regular education class occurs only when the nature or severity of the disability is such that education in the regular education class with the use of appropriate supplementary aids and services cannot be achieved satisfactorily.

(3) A student may not be determined to require separate education because the child cannot achieve at the same level as classmates who do not have disabilities if the child can, with the full range of supplementary aids and services, make meaningful progress in the goals included in the student's IEP.

(4) A student may not be removed from or determined to be ineligible for placement in a regular education classroom solely because of the nature or severity of the student's disability, or solely because educating the student in the regular education classroom would necessitate additional cost or for administrative convenience.

(5) School entities shall be required to provide access to a full continuum of placement options.

22 Pa. Code § 14.145. "The goal for each child is to ensure IEP teams *begin* with the general education setting, with the use of supplementary aids and services, *before* considering a more restrictive environment."<sup>16</sup> This hearing officer concludes that the District did not adhere to this directive or to the regulations. The record demonstrates that once it was determined that Student would be provided with itinerant learning support, Student was, virtually automatically, placed into ISL. (FF 37, 39) Indeed, in this case, the District recommended ISL for Student before the school year started, and continually sought to change Student's schedule to include ISL. (*Id.*; N.T. 240, 242-44, 481-82, 1184-85, 1373-74) There was no evidence that the IEP team truly considered whether Student could, with supplementary aids and services, successfully be educated within the regular classroom. Even recognizing that the IP was a new program in 2010-11, these repeated suggestions strongly suggest that Student's placement was not an individualized decision.

Moreover, while Student's assignments and tests were modified as necessary, there was little evidence of what supports Student was actually provided in the classroom. The presence of a special education teacher or instructional assistant in all classes appears to be both reasonable and appropriate (FF 43), yet it is also apparent that Student struggled with many classes that year, going so far as to ask the reading teacher to provide assistance. (FF 45, 54, 55, 56, 61, 65, 66, 67, 68, 77) Furthermore, Student continued to demonstrate well document needs for particular special education (FF 61, 75), while also exhibiting a clear lack of progress or even regression on IEP goals. (FF 69) The record is preponderant that the District failed to determine whether Student's special education needs could be met in the regular education classroom, and apparently because the parent did not agree to ISL or other special education classes, it provided only minimal appropriate special education to Student over the course of the 2010-11 school year.

I further conclude that the actions of the District which denied Student FAPE during the 2010-11 school year also constitute discrimination against Student on the basis of Student's disability under Section 504.

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<sup>16</sup> Commonwealth of Pennsylvania, Department of Education. *Inclusive Practices* at 3 (2001) (retrieved from <http://pattan.net-website.s3.amazonaws.com/files/materials/publications/docs/TDR-InclusivePract.pdf> (last visited August 4, 2011)) (emphasis added).

In addition to the parental participation contentions addressed above, the Parent also makes a number of arguments about asserted procedural violations, such as the composition the IEP team at various meetings, the failure to issue a Prior Written Notice when the decision was made to provide Just Words in the mornings, and variations among the several IEPs in this case. (Parent's Posthearing Submission at 62-70) However, "[a] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents." *C.H. v. Cape Henlopen School Dist.* 606 F.3d 59, 66 (3d Cir. 2010). The Parent does not specifically contend, and I am unable to conclude on this record, that there has been a substantive denial of FAPE to Student on the basis of these asserted procedural violations.

### Remedies

The next question is what relief is warranted. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

In this case, there was little if any evidence which would permit a determination of what position Student would have been in had Student been provided with appropriate educational programming throughout the 2010-11 school year. Thus, this hearing officer concludes that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Student in this case.

Student's implemented IEP provided for Student to receive approximately 132 minutes of special education each day. (N.T. 672-75) The proposed revisions to Student's IEP in August and September of 2010 suggested that Student required 2.5 hours of special education every day. (FF 41) This hearing officer finds the latter to be a reasonable starting point given Student's needs in the fall of 2010. Outside of the 25 minutes of Just Words provided each morning and the 15 minutes of mathematics instruction in basic skills, it is difficult to conclude with any certainty how much special education Student was actually receiving, but as discussed above, Student's grades and progress monitoring suggest that the level of services was minimal in the 2010-11 school year and that Student's needs were unmet. Subtracting the known 40 minutes of

special education provided from the 150 minutes contemplated by the proposed IEPs in the fall of 2010, and rounding the resulting 110 minutes up to 120 minutes, this hearing officer concludes that Student is entitled to two hours of compensatory education for every day that Student attended school in 2010-11.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. There are financial limits on the parents' discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

The Parent also seeks, as additional remedies, that the District be ordered to do the following: (1) instruct Student in the regular education classroom with supplementary aids and services; (2) ensure that Student is provided with private tutoring for any instruction that cannot be provided in the regular education classroom; (3) fully comply with the IEP regarding the adult Student would have access to when conflict arises; (4) hire an outside consultant to provide training on parent involvement; and (5) issue a written apology to her for the September 14, 2010 incident.

This hearing officer declines to order that Student be provided with full time regular education programming, particularly since Student will be entering a new grade in 2011-12. As noted above, school districts are required to provide a continuum of services and must make a determination of whether the child can, with supplementary aids and services, successfully be educated within the regular classroom; and then, if placement outside of the regular classroom is necessary, there must be a determination of whether the school has included the child with non-exceptional children to the maximum extent possible. *Oberti, supra*.

This hearing officer will, however, order the District to reconvene the IEP team to make the required determinations which was not done in the fall of 2010. It may be that, going forward, Student cannot successfully be educated in all regular education classes in order to be provided with FAPE.<sup>17</sup> Student continues to demonstrate well-documented needs that require specific intervention. That does not mean, however, that Student necessarily requires ISL. The IEP team must give full consideration to all of the *Oberti* factors in developing an appropriate program for the 2011-12 school year. It is also the strong suggestion of this hearing officer that the parties set aside any preconceived positions on Student's placement before this meeting convenes so that the decision can be made in light of Student's specific needs. At that same IEP

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<sup>17</sup> Thus, to the extent the Parent's expert testified that all students should start with "full inclusion" (N.T. 399), this hearing officer respectfully disagrees.



meeting, the team shall also determine, and agree upon, the specific adults to whom Student will have access when conflict or any potential disciplinary incidents arise during the 2011-12 school year.

With respect to private tutoring, the Parent may, if she chooses, elect to use the compensatory education for that purpose. If Student requires tutoring in order to be provided with an appropriate program, that tutoring must necessarily be part of Student's IEP. If, on the other hand, Student requires some special education intervention that cannot be successfully provided in the regular education environment, I decline to prospectively order that the District pay a private provider for this service outside of the school day. This, again, is a decision to be made by the IEP team, including the Parent.

Next, this hearing officer declines to order the District to issue a written apology to the Parent. I have already observed that the decision to discuss Student's educational program and schedule on the date of the September 14, 2010 incident was ill-advised. The discussion that date between the Parent and the principals was heated and emotional, and it was apparent from the testimony that the witnesses could not clearly recollect what was said and by whom. While a voluntary written apology would likely help to begin to repair the current distrustful relationship between the parties, I find that little useful purpose would be served by ordering the District to do so.

Lastly, this hearing officer lacks the authority to order that the District provide particular training to its personnel. *Robert O. v. Saucon Valley School District*, 785 A.2d 1069 (Pa. Commw. 2001).<sup>18</sup>

## CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the District provided FAPE to Student from November 19, 2009 to the end of the 2009-10 school year, but that it denied FAPE to Student for the 2010-11 school year. Consequently, Student is entitled to compensatory education. This IEP team will also be directed to convene and make the requisite determinations about Student's program and placement for the 2011-12 school year as described above.

## ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

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<sup>18</sup> Additionally, the Parent's other claims under Section 504 and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, are noted and denied as outside this hearing officer's jurisdiction.

1. The District did not provide FAPE to Student during the 2010-11 school year, and Student is accordingly entitled to, and the District is ordered to provide, 2 hours of compensatory education for each day that Student attended school that year.
2. The compensatory education hours are subject to the conditions and limitations set forth above.
3. The IEP team is directed to convene, within 20 days of the date of this order, and make the requisite determinations about Student's placement for the 2011-12 school year, and to identify the individuals to whom Student will have access when conflict or disciplinary incidents arise, consistent with the foregoing discussion.
4. The District is not ordered to take any further action.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: August 6, 2011

## ATTACHMENT A

This hearing produced a voluminous record, and a number of the exhibits are not set forth in an index in the transcripts. For the convenience of the parties, the exhibits admitted into evidence are set forth here along with an explanation of two exhibits on which ruling on their admission was reserved.

### JE Exhibits:

1	2	4	8	9	10	11	12	13	15	16	17
18	19	20	21	22	23	28	30	31	32	33	34
35	38	39	40	41	42	43	44	45	47	48	49
50	51	52	53	54	55	56	57	58	59	61	62
63	64	65	66	67	68	69	70	71	72	73	76
77	78	79	82	84	87	88	93	94	95	96	97
101	104	105	107	108	111	113	114	115	116	119	120
122	122A	123	127	132	133	134	135	136	138	140	

JE 137 (ruling reserved at N.T. 1384-86) is not admitted. The document which appears to be a position statement by Lindamood-Bell Learning Processes was not identified by the witness to whom it was shown, nor by any other witness. Moreover, the probative value of the document itself with respect to the issues in this case is questionable at best. The District's objection is hereby sustained.

JE 141 (ruling reserved at N.T. 1617-20) is not admitted. This document which appears to be a progress monitoring report from June 2010, which was not provided to counsel for the Parent until three calendar days before the sixth and final hearing session. (N.T. 1617-20) *See* § 34 C.F.R. § 300.512(a)(3); 22 Pa. Code § 14.162(k). As there was no justification provided for allowing this document into evidence, the Parent's objection is hereby sustained.

Hearing Officer Exhibits: The following HO exhibits, with the exception of HO 6, were not identified in the transcript but have been marked as follows and admitted:

- 1a – District's Motion to Dismiss dated December 28, 2010
- 1b – Parent's Motion to Amend dated December 28, 2010
- 2 – Ruling on Motion to Dismiss and Motion to Amend dated December 30, 2010
- 3 – District's Motion to Dismiss dated February 21, 2011
- 4 – District's Request for Subpoena dated February 18, 2011
- 5 – Parent's Response to Request for Subpoena dated February 22, 2011
- 6 – Notice of Decision Due Date (undated)
- 7 – Amended Notice of Decision Due Date (undated)
- 8 – Second Amended Notice of Decision Due Date dated July 8, 2011
- 9 – Third Amended Notice of Decision Due Date dated July 18, 2011
- 10 – Email Message to Counsel granting two day extension of written summations but retaining previous Decision Due Date

**ASSURANCE FOR THE IMPLEMENTATION OF  
DUE PROCESS HEARING ORDER**

Pursuant to 22 Pa. Code §14.162, 34 CFR §300.507, 22 Pa. Code §16.63, or §711.62, the undersigned Superintendent/Chief Executive Officer of Lower Merion School District within Intermediate Unit 23, assures that the MAWA/local education agency has fully implemented the August 6, 2011 Order of Cathy A. Skidmore, Due Process Hearing Officer, regarding Richard Coleman, ODR File No. 01784-1011KE.

- 
- |  |               |
|--|---------------|
| <input type="checkbox"/> Superintendent<br><input type="checkbox"/> Chief Executive Officer<br><input type="checkbox"/> IU Executive Director<br><input type="checkbox"/> Preschool EI Coordinator<br><input type="checkbox"/> Infant/Toddler EI Coordinator<br><input type="checkbox"/> Other _____ | <hr/><br>Date |
|--|---------------|

Please return this form to:

Karen Eberly, Case Manager  
Office for Dispute Resolution  
6340 Flank Drive  
Harrisburg, PA 171112

Attachment:      Instructions for Completion of Assurance Forms



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## Appeal Timelines and Instructions for Completing Assurance Forms

**ODR DOES NOT MAKE A DETERMINATION AS TO WHETHER AN LEA OR PRESCHOOL EARLY INTERVENTION PROGRAM IS IN COMPLIANCE WITH A HEARING OFFICER DECISION, NOR DOES ODR INTERPRET SUCH DECISIONS. ISSUES REGARDING COMPLIANCE SHOULD BE DIRECTED TO THE APPROPRIATE DIVISION CHIEF OF THE BUREAU OF SPECIAL EDUCATION, OR THE LEA SOLICITOR, OR OCDEL FOR EARLY INTERVENTION CASES.**

I. Appeal Timelines

A Hearing Officer Decision concerning early intervention, school-age, and/or Section 504 issues for children with disabilities may be appealed by either party to state court within thirty (30) calendar days, or to federal court within ninety (90) calendar days of the date of that decision.

II. Completion of Assurance Forms

When a hearing officer orders an EI-Preschool Early Intervention, LEA or Charter School to take action, the EI-Preschool Early Intervention, LEA or Charter School is obligated to complete an assurance form, assuring that it has complied with the hearing officer's decision. The completed form is sent to the Office for Dispute Resolution. If the hearing officer has not ordered the EI-Preschool Early Intervention, LEA or Charter School to take any action, then an assurance form is not required.

III. Child's Status During Appeals: Completion of Assurance Form

If the hearing officer agrees with the child's parents that a change of placement is appropriate, the child is afforded that placement during the pendency of any administrative or judicial proceeding, consistent with the requirements at 34 CFR § 300.518(d). Within thirty (30) days of the hearing officer decision, an assurance form must be executed by the EI-Preschool Early Intervention, Superintendent or Charter School Chief Executive Officer and returned to the assigned Office for Dispute Resolution Case Manager, assuring that the child has been afforded the ordered placement regardless of any appeal.

IV. Timeline for Completing All Other Assurance Forms (i.e. those not covered under Section III. above)

Until the expiration of the applicable appeal period, the EI-Preschool Early Intervention, LEA or Charter School is not obligated to implement the Hearing Officer's Decision. At the expiration of the appeal period, if no appeal has been taken, the EI-Preschool Early Intervention, LEA or Charter School is required to



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comply with the Hearing Officer's Decision. The EI-Preschool Early Intervention, LEA or Charter School has sixty (60) calendar days after the expiration of the appeal period in which to complete, have executed by the EI-Preschool Early Intervention, Superintendent or Charter School Chief Executive Officer, and return the assurance form to the assigned Office for Dispute Resolution Case Manager.

If an appeal is taken from the Hearing Officer Decision, the LEA or Preschool Early Intervention is not required to implement the Decision unless directed to do so by the judiciary.