

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

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DECISION

DUE PROCESS HEARING

Name of Child: Jordan Smith
ODR #9288/08-09 AS

Date of Birth:
June 8, 1988

Dates of Hearing:
October 28, 2008
December 9, 2008
December 12, 2008
January 20, 2009
February 6, 2009
February 13, 2009

CLOSED HEARING

Parties to the Hearing:

Ms. Beverly Smith
178 Elephant Road Apt. B-15
Dublin, PA 18917

Pennridge School District
1200 N. Fifth Street
Perkasie, PA 18944

Representative:
Mark Voigt, Esquire
Plymouth Mtg. Executive Campus
600 W. Germantown Pike Suite 400
Plymouth Meeting, PA 19462

Grace Deon, Esquire
Eastburn and Gray
600 E. Court St. Box 1389
Doylestown, PA 18901

Date Record Closed:

March 26, 2009

Date of Decision:

April 8, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.

Jordan Smith is a 20-year-old eligible student enrolled in the Pennridge School District (hereinafter District). Ms. Smith, Jordan's mother (hereinafter Parent) requested this hearing because she believes that the District denied Jordan a free, appropriate public education (FAPE) for the 2006-2007 and the 2007-2008 school years, that the District improperly denied Jordan Extended School Year (ESY) services for the summers of 2007 and 2008, and that in this current school year (2008-2009) the District has failed to offer Jordan an appropriate IEP that will prepare him for transition to college. The Parent seeks tuition for Landmark College, transportation to and from Landmark, and/or compensatory education services as well as reimbursement for an independent educational evaluation (IEE).

Background

1. Did the Pennridge School District deny Jordan Smith FAPE for school years 2006-2007 and/or 2007-2008?
2. If the Pennridge School District denied Jordan Smith FAPE for the 2006-2007 and/or the 2007-2008 school years, is he entitled to compensatory education, in what form and in what amount?
3. Is the IEP the Pennridge School District offered to Jordan Smith for the 2008-2009 school year appropriate?
4. If the IEP the Pennridge School District offered to Jordan Smith for the 2008-2009 school year is not appropriate, is he entitled to payment/reimbursement of private school tuition for Landmark College?
5. If tuition payment/reimbursement is awarded, must the Pennridge School District fund Jordan Smith's transportation costs to and from Landmark College?
6. Did the Pennridge School District improperly deny and/or offer inappropriate Extended School Year (ESY) services to Jordan Smith for the summers of 2007 and/or 2008 if in fact he was eligible for them?
7. Must the Pennridge School District reimburse Ms. Smith for the Independent Education Evaluation conducted by Dr. Margaret Kay?

¹ The period from September 24, 2006 to September 24, 2008. However the 2008-2009 school year is encompassed in Issue 3.

Description of Jordan

1. Jordan is eligible for special education services under the classification of specific learning disabilities in reading and written expression.² (NT 25-28)

2. Jordan has average to superior ability to learn auditorily. (NT 313)

3. Jordan's teachers, in their testimony, described him as follows:
Algebra II Teacher: hard-working, almost always has his homework, always puts his best foot forward to understand everything, always proactive and would ask questions if he didn't understand something, would work through everything, stayed and asked questions after class sometimes. (NT 513-514)

Money Management Teacher: an excellent student, one of the top students as far as his ability to add information to the class, his willingness to participate in class and the level of effort he puts forth in his studies. (NT 576-577)

Academic Geometry Teacher: he's great, an active participant in class, many times if I ask a question other students don't readily know the answer to his hand is right up, he understands it, he can answer easily 99.9999 percent of the time they're right on target, works well with other students, in pair activities is always willing to help students in need, volunteers to do anything he is comfortable doing, is very successful and is a pleasure to have in class. (NT 617-618)

Special Education Teacher 1st and 12th Grades: very studious, wants to achieve, quiet in class until he feels comfortable, always wanted to do his best, conscientious, hardworking, completed assignments on time or with extra time if he needed it. (NT 1040-1041)

Informal Geometry Teacher: a very hard worker, I enjoyed having him in class, very self-motivated, advocated for himself when he didn't understand something. (NT 1231)

4. Jordan has excellent long-term memory for facts, such that once he learns something he doesn't forget it. (NT 313, 1283)

5. Jordan was evaluated in July 2008 by Dr. Margaret Kay, a certified school psychologist and licensed psychologist in Pennsylvania. She has practiced psychology for over 30 years and has been retained by parents and by school districts to provide independent educational evaluations. She has worked for

² This was established between counsel and the hearing officer following the opening statements.

Findings of Fact

³ Neither of these two weaknesses is at issue here. It was established that Jordan has a specific learning disability in reading and that the speech/language issues are secondary to the reading disability or very mild if they stand alone. (NT 1315-1316)

6. Jordan was also seen for brief testing by Dr. John Davidson, a certified school psychologist and licensed psychologist in Pennsylvania. He has practiced psychology as a school psychologist in the District for the past 11 years, and previously worked for non-public schools in Philadelphia, for a New Jersey Department of Education Child Study Team, and as a clinical supervisor at the Penn Foundation. He also maintains a private practice. He is qualified as an expert in school psychology. (NT 1254-1255, 1257)
7. None of the scores Jordan obtained when working with Dr. Kay surprised Dr. Davidson once he had worked with Jordan himself. Dr. Davidson agreed with Dr. Kay's conclusions concerning Jordan's disability, except with her finding a reading comprehension weakness and a speech/language weakness.³ (NT 1269, 1274, 1276)
8. Dr. Davidson did not prepare a report of his assessment work with Jordan. (NT 1316-1317)
9. Jordan had been previously diagnosed as an individual with severe dyslexia. He has a history complicated by frequent chronic ear infections which block sound stimulation to the language centers of the brain inhibiting the formation of rich neuronal connections. (NT 240-241)
10. Children's Hospital of Philadelphia (CHOP) Department of Neurology found Jordan to have a mild static encephalopathy, a type of injury where the brain is not fully developed, in Jordan's case the left frontal region. (NT 242, 1282)
11. Jordan received Early Intervention services, and then special education services in the Palisades School District following testing in first grade. He remained in the Palisades School District through half of sixth grade. (NT 242)
12. Jordan has been given cognitive testing several times. In first grade he scored a Full Scale IQ of 121 (superior range) on the Wechsler Intelligence Scale for Children Third Edition (WISC-III); prior to entering third grade his Full Scale IQ was 106 on the WISC-III; and, in July 2008 on the Wechsler Adult Intelligence Scale (WAIS) his Full Scale IQ score was 108, which was depressed by his processing problems. (NT 242-243; P-29)

13. Jordan's cognitive testing by Dr. Kay resulted in the findings that he has verbal comprehension and non-verbal reasoning skills in the high average to superior ranges, average to well below average short-term auditory working memory skills, and severely impaired ability to scan and track across print and to identify the directionality of symbols. (NT 249-252; P-29)
14. Jordan has mixed dominance (left-handed and right-eyed) which correlates with frequency of reversal errors. These reversals do not usually persist into later age, as they do with Jordan. (NT 260-261)
15. Jordan's constellation of scores signifies that his dyslexia involves not only severe phonological processing problems (difficulty hearing phonemes, the smallest units of sound, and retaining those sounds in a sequence in short-term memory) but also quite severe orthographic processing problems (mixing up symbols). Not all dyslexic individuals have the orthographic processing deficit. (NT 251-252; P-29)
16. Jordan's reading specialist who began working with him in November 2008 testified that "Jordan's disability is clearly the most severe I've ever worked with". (NT 1086)
17. Jordan's performance on the Modern Language Aptitude Test was extremely poor, indicating that he is entitled to a waiver from foreign language instruction at the college level. (NT 253; P-29)
18. On the Comprehensive Test of Phonological Processing Jordan was below average in phonological awareness (ability to discriminate phonemes and words), well below average in phonological memory (ability to retain sounds in a sequence in short-term memory), and well below average in rapid naming speed (identifying letter and numeric symbols). (NT 260; P-29)
19. As assessed by the Woodcock-Johnson III fluency tests, Jordan's fluency (number of items he can complete in a short period of time – reading three minutes, math three minutes, writing seven minutes) in reading, math and writing is extremely slow, in the most severe category. In contrast, his fluency of oral expression is above average to far above average. (NT 254, 258; P-29)
20. Dr. Davidson, upon examining Jordan found that he was extremely diligent, but was extremely slow in terms of the speed at which he works. (NT 1269)
21. It took Jordan significantly longer to complete the testing with Dr. Davidson than Dr. Davidson would have expected based on average administration time. Dr. Davidson characterized Jordan as "amazingly persistent" and noted that most students with the difficulties that Jordan has would "probably have just told me they're not doing it". (NT 1269)

22. Jordan took almost five hours to complete a recent Key Math III test which should have taken about 90 minutes. Jordan scored a grade equivalent of 5.2 on multiplication and division and a 7.3 in mental computation, putting him roughly five to seven years behind his grade peers in those areas. (NT 262-263, 1269-1270, 1331)

23. Jordan's vocabulary and comprehension were tested with the Gates-MacGinitie Standardized Reading Test in early September. There were 45 questions of which he answered 25 and of these 22 or 23 answers were correct. The test has some easier questions in the beginning. Because it was taking Jordan so long to go through the words the teacher discontinued the test and just scored him on the number correct. (NT 980-982)

24. Given unlimited time, Jordan can comprehend what he reads. However, because his reading speed is so slow as he spends time trying to phonetically decode each individual word, his reading is extremely laborious and cannot be considered functional at this time. (NT 257)

25. Jordan read out loud at the hearing on two separate occasions. His reading was painfully slow,⁴ and he was clearly trying his best. On a test of reading fluency administered in July 2008 he was at the 1.6 grade level (sixth month of first grade) in reading fluency. (NT 324, 330-331, 335-336, 374, 479-480; P-29)

26. On one of the occasions when Jordan read aloud at the hearing, it took him between 40 and 45 seconds to read the sentence, "When Benjamin Franklin returned to America in 1762 after almost five years in London he was shocked at the housing prices". The reading specialist working with Jordan testified that pace was typical of how he reads in class. The school psychologist, who does not have a learning disability, read the same sentence at the hearing in 6 seconds. It took Jordan about seven times longer to read this sentence that it would take a non-disabled person. (NT 1018, 1321-1322; P-62)

27. At the hearing Jordan complied with his attorney's request that he copy two sentences from a brochure. "Welcome to Landmark College. Like you we do things a little differently." It took Jordan two minutes and ten seconds to copy the sentence. (NT 483; P-62a)

28. As assessed by the Wechsler Individual Achievement Test Second Edition (WIAT-II), which is co-normed with the Wechsler IQ tests⁵ so predictions can be

⁴ This hearing officer drew the analogy to an untalented piano student, playing each individual note hesitatingly and without regard for rhythm or tempo, constantly correcting mistakes, such that a lively waltz emerges as a dirge and is virtually unrecognizable to a listener. It is noted that Jordan seemed relieved with each word he read just as the pianist is grateful to have landed on each correct key. (NT 395-396)

⁵ The Full Scale IQ was used, which is a very conservative estimate of Jordan's intelligence because it is depressed by his processing speed and his learning disorder. A better estimate of his intelligence would be

made whether a student is learning skills to the level of his ability, Jordan showed significantly low achievement vs. aptitude scores in sight word identification, phonetic decoding, math reasoning with word problems, spelling, and written expression. Verbal expression is significantly high. (NT 255-256; P-29)

29. Assessed with the Peabody (given a word, the test-taker points to the picture most accurately depicting that word), Jordan's receptive vocabulary score is in the superior range. (NT 259; P-29)

30. The Developmental Test of Visual-Motor Integration, which involves copying geometric forms using paper and pencil, revealed a very low score, indicating that Jordan's handwriting is likely to be inconsistent, poorly organized, and very slowly formed. If he would try to speed up, the accuracy and legibility of what he writes would diminish. If he slows down to achieve accuracy, he takes an inordinate amount of time to do very basic writing tasks, a condition labeled dysgraphia. (NT 258-259)

31. The special education teacher working with Jordan on his writing since mid-November 2008 characterizes Jordan's writing disability as "severe" in comparison to other students she has taught who had disabilities in written expression. (NT 1186-1187)

32. Samples of Jordan's written schoolwork, which contains multiple spelling and convention errors and demonstrates his very poor handwriting, as well as the extent to which he is aided by a scribe and/or through extensive editing is demonstrated in the record. (NT 149-155; P-54)

33. Jordan does Civil War reenacting. He does bicycle riding, and enjoys learning about history through the History Channel and the Discovery Channel and through any books about history that he can find on tape. He would like to become a history teacher. (NT 454-455, 485-486)

Pennridge 2002 to 2006 - Background

34. Pursuant to an IEP dated June 15, 2001, Palisades had begun providing Jordan with five sessions per week of one-on-one Wilson reading instruction. However, because he had not been given instruction in a program such as Wilson, that is, intensive synthetic, phonetic code emphasis instruction and phonological training and instruction for learners with severe orthographic processing problems in his early years (kindergarten through third grade) in Palisades, by the time he entered the Pennridge School District he was "already in a deep, deep hole". (NT 39, 269)

35. When Jordan arrived at Pennridge in January 2002 in sixth grade, his literacy skills were very far below expectations for his age and grade and created an

the Verbal Comprehension Index. Had the VCI been used Jordan would have shown even greater discrepancies between aptitude and achievement. (NT 255)

- obstacle for him to use reading for such things as learning from textbooks, taking notes, and passing tests. (NT 270)
36. An April 2003 re-evaluation report noted that Jordan's reading was "significantly below (grade) level", and one of his teachers reported that Jordan was "an intelligent boy who has severe reading and writing deficits" whose "writing was slow and laborious" and who needed much more time to complete assignments as a result of his deficits. (P-6)
37. Pennridge provided Jordan with significant accommodations as a "workaround" to the severe literacy skill deficits. (NT 271)
38. Jordan had been receiving 5 one-to-one hours a week of the Wilson reading program in the Palisades District. After he had been in the District for a year, the District funded the resumption of the Wilson program through an outside Wilson II certified tutor, at two weekly sessions of an hour and a half each in the evening. (NT 39, 50-51, 56, 58, 77)
39. The Parent and the Wilson tutor believed that the two sessions per week were not sufficient and the Parent indicated this in writing to the District. As of the May 2004 IEP meeting, Wilson tutoring was offered for three sessions a week rather than two, for the summer. (NT 55-56, 61-62; P-12, P-52)
40. An IEP meeting was held in September 2004. Although the District did not list the Wilson program in the specially designed instruction or supportive services section of the IEP, outside Wilson tutoring continued to be funded and the services remained at the three-session-per-week level for the 2004-2005 and the 2005-2006 school years. The Parent requested an additional weekly session but this was denied. There was discussion about having the Wilson take place in school with a teacher who had taken a Wilson introductory course, but this change was not made. (NT 57, 60, 67-68, 78; P-14, P-15)
- Pennridge School Year 2006-2007 (11th grade)
41. An IEP was prepared on June 12, 2006 for the 2006-2007 school years ("June 2006 IEP"). (P-18)
42. Despite Jordan's need and utilizing a laptop with assistive software (I Book, Write Out Loud, and Co-Writer are listed in the annual goal) the Assistive Technology box under Other Special Considerations was not checked. (P-18)
43. The June 2006 IEP contained Present Levels of Academic Achievement that were identical to those reported on the previous IEP of September 22, 2005. Under Present Levels the IEP incorrectly states "Jordan is presently in 10th grade". (NT 80-81; P-15, P-18)

44. The June 12, 2006 IEP had the same annual goals as those on the September 22, 2005 IEP, despite the fact that the June 2006 IEP's Present Levels indicated that Jordan made no academic progress. In fact the annual goals in the June 2006 IEP are exactly word-for-word the annual goals in the previous year's (September 2005) IEP, including the same typographical errors. (NT 81-82; P-15, P-18)
45. The annual goal for reading decoding and encoding makes no sense, as it calls for Jordan to increase his overall skills in these areas from an undocumented "baseline 90%" to an unspecified level. (P-18)
46. The annual goal for writing calls for Jordan to "improve" his writing skills to an unspecified level, and construct a "5 paragraph essay" with sentences of unspecified length and complexity. The progress method and progress reporting frequency is "as assigned". (P-18)
47. Neither the reading nor the writing goals has baseline or expected outcome data by which to measure progress. (P-18)
48. In a report dated May 21, 2006, the outside Wilson tutor had recommended continuation of Wilson at the "current level of frequency" to build upon his skills. Wilson continued at the current level during 2006-2007 and is included in the IEP under Present Levels and Annual Goals but not under SDI⁶. (P-18, P-55)
49. During the 2006-2007 school year (1st grade) Jordan received no intensive specially designed instruction in written expression. Although I Book, Write Out Loud, and Co-Writer are listed as SDI, there is no provision in the IEP for assisting Jordan to use these tools. (NT 83-84; P-18)
50. Progress Monitoring information conveyed to the Parent for the first two quarters of the 2006-2007 school year [listed "as assigned" for the methods of measurement of progress and reporting of progress for the writing goal]. The Report(s) of Progress note: "Jordan is meeting his expected level of achievement" and "Jordan continues to work towards his expected level of achievement". There is no definition of what the expected level specifically is, what "meeting" means, or what "continues to work towards" means. (P-23)
51. Jordan credibly described the program he received during the 2006-2007 school year, and his recollections supported the finding that the program over-relied on workarounds and did not address his dyslexia (reading and written expression) in an effective manner, only relying on the Wilson tutor to provide that part of his FAPE. (NT 455-463)

⁶ Wilson is also listed under ESSY, but notes a year's duration (6-12-06 to 6-12-07). (P-18)

- ESY Summer 2007
52. In an IEP dated June 4, 2007 the District eliminated Jordan's summer Wilson tutoring program, and the IEP says that the IEP team considered and discussed ESY services and determined that Jordan did not need these. The Parent was not given the opportunity for input into these decisions, which decisions were attributed to both the director of pupil services, who was not a member of the IEP team, and to the previous special education coordinator. (NT 90-91, 125-129, 464; P-20)
53. In a letter dated June 5, 2007 the Wilson tutor expanded upon the reasons for his May 21, 2007 recommendation that Jordan continue receiving the Wilson program at his current level of frequency. He opined that "it is also imperative that Jordan continues to receive instruction throughout the summer months so as to prevent the regression of established skills". The letter was given to the District. (NT 130-131; P-55)
54. The Parent attempted to discuss the denial of ESY in the form of Wilson with the District, but her call was not returned until mid-summer. The Parent disapproved the NOREP dated June 24, 2007. The Parent considered having a due process hearing but decided not to file a request for various reasons. (NT 91-92, 129-132; P-21)
- Pennridge School Year 2007-2008
55. In a report dated May 2, 2007 the outside Wilson tutor had recommended continuation of Wilson at the "current level of frequency" to build upon his skills. (P-55)
56. As the Wilson tutor was retiring, the Parent informed the District that a new Wilson tutor had to be found for the 2007-2008 school year. The District did not look for a new Wilson tutor. (NT 132)
57. An IEP was prepared on June 4, 2007 to cover Jordan's 12th grade year. (P-20)
58. As in the previous IEP, the Assistive Technology box was not checked in the Other Special Considerations section in the June 2007 IEP. (P-20)
59. In the June 2007 IEP, Jordan's Present Levels of Academic Achievement do not list his status in the Wilson program. (P-20)
60. In the June 2007 IEP, Jordan's Present Levels of Academic Achievement for Reading says he "nearly achieved the standard" for basic understanding and for analysis and interpretation. On the IEP there is no explanation of what the standard was and what "nearly achieved" means. (P-20)
61. In the June 2007 IEP, Jordan's Present Levels of Academic Achievement for Writing says he "achieved the standard" for effectiveness and for conventions.

- Again the standard is not specified nor is the level at which he achieved the standard. (P-20)
62. In the June 2007 IEP, Jordan's Present Levels of Academic Achievement for Math notes that he is "below standard" in mathematical skills and problem solving, and "nearly achieved the standard" in concepts. Again, there is no notation of what the standard is, what below standard means, or what nearly achieved the standard means. (P-20)
63. Despite Jordan's being below the standard in two of the three mathematics areas and "nearly" achieving the standard in the third area, there is no mention of mathematics under the Needs section and there is no Annual Goal for mathematics in the June 2007 IEP. (P-20)
64. Despite the designated Need of improving his reading and decoding skills, and Jordan's severe dyslexia, there is **no Annual Goal for reading** in the June 2007 IEP. The Wilson program was eliminated and there was no provision for Jordan to receive reading instruction in the IEP. (P-20)
65. In the June 2007 IEP the Annual Goal for writing calls for Jordan to construct a 5-paragraph essay with 70% accuracy each marking period. The previous IEP called for 80% accuracy for an essay of the same length. There is no specification of the length of the paragraphs, or the expected level of sentence structure and vocabulary. The progress measurement reads "as assigned". (P-18, P-20)
66. Despite Jordan's teachers commenting that he was a hard worker and completed his homework and class assignments, the June 2007 IEP carries an Annual Goal for organization skills involving organizing assignments. (P-20)
67. The June 2007 IEP contains half the SDI that were in the previous year's IEP. SDI eliminated were: sending home all reading and long term assignments in social studies, science and math at least one week in advance; use of I Book, Write Out Loud, and Co-Writer; use of agenda; encouraging Jordan to advocate for himself; textbooks on tape; call Parent if assignments are late or missing, extra set of textbooks. (P-18, P-20)
68. Given that there was not a problem with assignments, the elimination of sending home all reading and long term assignments in social studies, science and math at least one week in advance; use of agenda and call Parent if assignments are late or missing; and extra set of textbooks makes sense except that there was still the Annual Goal for Organization. (P-20)
69. By letter dated July 2, 2007 believing that the District wanted to eliminate the Wilson program the Parent expressed concern about Jordan's progress and requested records. (NT 135-136; P-56)

70. An IEP meeting was held on October 15, 2007. The IEP meeting was held to add a teaching assistant for Jordan for a psychology course with which he was having difficulty. None of the deficiencies of the June 2007 IEP were corrected at this revision meeting. (NT 141-143; P-20, P-22)

71. In February 2008 the current special education coordinator informed the Parent that the District would not offer the Wilson program any longer. The program had not been offered since June 2007. Jordan had not completed the Wilson program, and had not had instruction in the fluency portion of the program. (NT 132-133, 187)

72. Jordan testified credibly to the content and methods of instruction during the 2007-2008 school year, again clearly establishing that the District emphasized workarounds rather than addressing his severe dyslexia. (NT 466-472)

ESY Summer 2008

73. The May 2008 IEP notes that the IEP team considered and discussed Jordan's need for ESY and determined that he did not qualify. The Parent did not have input into this decision and no data was offered into evidence at the hearing supporting this decision. (S-11)

74. The District denied permission for Jordan to access Books for the Blind and Dyslexic over the summer for pleasure reading as per District policy. He was only authorized to access books in tape. (NT 439-442)

Fennridge School Year 2008-2009

75. The District held an IEP meeting on May 29, 2008. The District was of the opinion that Jordan should graduate. In July 2008⁷ the District wrote to the Parent about having Jordan complete his graduation requirements. (NT 156-157; S-11, P-36)

76. The Draft May 2008 IEP did not check the need for Assistive Technology under the Other Special Considerations section. (S-11)

77. The Present Levels of Academic Achievement lists 2007 PSSA results as "Basic" in Reading and in Math and as "Proficient" in Writing. However, a scribe was used for the Writing section of the PSSA testing so Jordan's spelling and punctuation deficits were not evident to the person scoring the test. (NT 89-90; S-11)

78. New Standards testing from 2006 was referenced despite this being a 2008 IEP. (S-11)

79. There are no issues listed under the Needs section. (S-11)

⁷ The letter bears an incorrect date in the heading.

80. The District did not include Annual Goals as Jordan's program for the following year had not yet been worked out. However, the District should have been well aware of his needs at this time. (S-11)
81. The only SDI listed were extended test-taking time and the opportunity to take tests in the resource room, and the opportunity to request copies of class transparencies and /or class notes. (S-11)
82. Jordan's initial schedule issued on August 15, 2008 for the Fall and Spring of the 2008-2009 school year⁸, with each period being 43 minutes, was as follows: (NT 136-140; P-49)
- | | |
|--|---|
| <p style="text-align: center;"><u>FALL</u></p> <p>Community Living
Study Hall
Sports Entertainment Marketing
Informal Geometry
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Food Prep II
Informal Geometry
Study Hall
Community Living
<u>SPRING</u></p> | <p style="text-align: center;"><u>FALL</u></p> <p>Community Living
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Study Hall
Community Living
<u>SPRING</u></p> |
|--|---|
83. The above schedule was never implemented, and Jordan's revised schedule, issued on September 5, 2008 for the Fall and Spring of the 2008-2009 school year, was as follows: (NT 168; P-49)
- | | |
|---|--|
| <p style="text-align: center;"><u>FALL</u></p> <p>Community Living
Study Hall
Study Skills
Money Management
Geometry
Lunch
Work Education</p> | <p style="text-align: center;"><u>SPRING</u></p> <p>Community Living
Study Hall
Study Skills
Personal Finance Management
Geometry
Lunch
Work Education</p> |
|---|--|
84. The Community Living course was an instructional setting with all but two students being in the very limited range. (NT 136-139)
85. Neither of these rosters indicated that Jordan would receive specially designed instruction in reading decoding and fluency or written expression. (P-49)
86. The District prepared another draft IEP on September 24, 2008. (S-12)
87. The September 2008 IEP checks 'no' under the question of whether Jordan needs assistive technology or other services. (S-12)

⁸ Incorrectly labeled as the 2007-2008 schedule for grade 12.

88. Under Present Levels of Academic Achievement the September 2008 IEP notes that Jordan is attending a 13th year "to continue to work on IEP and Transition goals". Although strengths derived from the 2007 PSSA results are listed for Reading and Math, there are no comparable strengths listed for Writing. (S-12)
89. At the time the September 2008 IEP was prepared the District had a copy of Dr. Kay's extensive testing results on September 4, 2008) but did not include them in the Present Levels section of the IEP. (S-12, S-14)
90. The IEP notes that "due to Jordan's specific learning disability he continues to need specially designed instruction to assist him with completing his IEP goals". Jordan's Needs were listed as, "Increase reading, writing and math skills". (S-12)
91. The September 2008 IEP carries a reading Annual Goal: Given instructional level reading materials, Jordan will demonstrate comprehension after reading by answering inferential and factual questions with 80% accuracy, 3 out of 4 consecutive times assessed over the course of the IEP year. PA Standard 1.1.11 baseline to be taken _____. (S-12)
92. This annual goal does not note the instructional level, despite information contained in Dr. Kay's report, and the IEP contemplates establishing a baseline at an unspecified time of the year. (S-12)
93. Jordan does not have needs in the area of reading comprehension. In addition to Dr. Kay's findings, the District listed reading strengths in this IEP (according to the PSSA 2007) as: understanding fiction text appropriate to grade level; interpretation and analysis of fiction and nonfiction text; analyze components within and across texts; analyze the effectiveness of the author's use of literary devices. (NT 349; S-12)
94. The September 2008 IEP carries a second reading Annual Goal: Given instructional level high interest reading materials, Jordan will demonstrate fluency and decoding with 70% accuracy 3 out of 4 consecutive times assessed over the course of the IEP year. PA Standard 1.1.11. Baseline to be taken _____. (S-12)
95. The IEP does not note how an accuracy rate of 70% in fluency will be determined, if in fact such a statistic makes any sense. There is no notation of when the baseline would be taken and no reference to Dr. Kay's results. (S-12)
96. The September 2008 IEP carries a writing Annual Goal: Given an informational writing prompt, Jordan will write complex informational pieces (e.g. research papers, analyses, evaluations, essays) with clarity and sharp distinct focus with 80% accuracy, 3 out of 4 consecutive trails assessed quarterly over the IEP year. PA Standards 1.5.11. Baseline to be taken _____. (S-12)

97. The annual goal does not specify the length of the pieces required, how the 80% accuracy will be judged, the level of independence he would be required to demonstrate and with how much assistance he would accomplish the tasks. The annual goal does not note when the baseline would be taken, and does not reference results of Dr. Kay's recent testing. (S-12)
98. The September 2008 IEP carries a mathematics Annual Goal: Given an instructional level math probe involving mathematical word problems, Jordan will develop and use computational concepts, operations and procedures with 80% accuracy 6 out of 8 consecutive trials assessed quarterly over the IEP year. PA Standard 2.2.11. Baseline to be taken _____. (S-12)
99. The annual goal does not specify his instructional level, which type of mathematics word problem Jordan would be given, what operations he would need to use, and when the baseline would be taken. Dr. Kay's results were not referenced as a baseline. (S-12)
100. The only SDI listed to enable Jordan to make progress on these ephemeral goals are: chunk larger assignments with due dates (although Jordan did not demonstrate any difficulty with assignment completion or organization), have the opportunity to have tests read (this represents a workarround strategy and does not address decoding), allow extended time for tests and quizzes (another workarround) and opportunity to take tests in resource room (yet another workarround). (S-12)
101. Again the IEP notes that the IEP team discussed ESY services and determined that there was no need. A more appropriate time to have discussed this issue, given that this is a September IEP, would have been in January 2009. A more accurate notation however would have been that Jordan would be ineligible for ESY in the summer of 2009 because he would have turned 21 years of age in June.⁹ (S-12)
102. Jordan credibly described the content and the methods used to instruct him during the beginning of the 2008-2009 school year. (NT 473-479)
103. As of September 30, 2008 the District through counsel proposed a new class schedule wherein the September 2008 IEP could be implemented. The Parent did not approve the new schedule because she had been told by the special education coordinator that the services could not begin unless there was an approved IEP. (NT 412-415; S-18)
104. Jordan was to receive first period "Direct instruction in reading" for 45 minutes daily in a class with 4 students. The District disagreed with the Parent

⁹ This is only one example of the simple lack of thought that went into all Jordan's Pennridge IEPs in evidence at the hearing.

105. Second period would be Advanced Wood Tech, requested by the Parent because Jordan enjoyed this and it would give him the change to use concepts learned in geometry. (S-18)

106. Third period was to be Money Management and Personal Finance, with an aide included in the class. The Parent appeared to agree with this course. (S-18)

107. During the fourth and fifth periods, Jordan would have geometry. However, the class only meets for 45 minutes, despite its being a double period. (S-18)

108. After a sixth period lunch, Jordan would have seventh and eighth periods for one-to-one writing instruction, although this would only be a total of 45 minutes. The teacher was to be a special education teacher who is certified in English. (S-18)

109. Ninth period would be Resource Room where Jordan could access additional support from a special education teacher in any subject in which he was experiencing difficulty. Other students may be coming into the room at this time in order to take tests. (S-12)

110. Period ten would be another reading instruction period with three to five students and the instructor from first period. (S-18)

111. The Parent agreed to the implementation of this schedule that was put into place in mid-November. (S-19)

112. The District developed an IEP on November 12, 2008 and the draft was done in December 2008. (S-19)

113. Notably, the assistive technology block was still not checked. (S-19)

114. The November/December 2008 IEP continued to repeat the 2007 PSSA data from the September 2008 IEP, and although the IEP team reviewed and considered [Dr. Kay's] evaluation" it determined that it provided "neither new nor additional information" about Jordan's disability and exceptionality. The IEP's

¹⁰ This precise language suggests that rather than using the robust data Dr. Kay had supplied to construct solid IEP, the District was concerned about shielding itself from potential responsibility for paying for Dr. Kay's evaluation.

- Present Levels of Academic Achievement did not cite any of Dr. Kay's findings. (S-12)
115. The District did note results of the Key Math (a 90-minute test which took Jordan about 5 hours to complete) as follows¹¹: Multiplication and Division GE 5.2, Mental Computation GE 7.3, Data Analysis and Probability GE 9.3, with other areas being at the 10th grade level. (NT 481; S-12)
116. A revised class schedule was included in the November/December IEP. Periods are as follows: 1) Small group reading as above; 2) Wood Tech as above; 3) Money Management as above in the Fall and Resource Room Study Hall in the Spring; 4/5) Geometry as above; 6) Lunch as above; 7/8) Resource Room Study Hall; 9) one-to-one writing instruction; 10) one-to-one reading instruction. The reading instructor for this period is a certified reading instructor, but not a special education teacher. (S-19)
117. Neither of the two reading teachers who are working with Jordan during the 2008-2009 school year has training or experience in working with dyslexic individuals. Neither is a certified special education teacher although both are certified reading specialists. (NT 978, 1019, 1085, 1135)
- Jordan's Needs
118. Dr. Kay and Dr. Davidson concur that Jordan has the cognitive ability to excel in college prep and college level courses. (NT 1284)
119. Jordan still does not have his literacy skills established up to a level where he can participate fully in a college level curriculum and access his textbooks other than by hearing them or complete work that requires reading and writing. (NT 271)
120. Jordan requires a very intensive program provided by experts who work with severely dyslexic individuals to close his skill gaps and train him in the technologies that might be helpful to him in college level courses so that he can survive in college. (NT 272, 329)
121. Jordan requires a synthetic, phonetic code emphasis approach to reading, such as the Wilson Reading program which was designed for smart dyslexic persons, moves into the adult level and has a fluency component built into it. (NT 273)
122. Jordan requires the Wilson program on an intensive basis, daily, for at minimum a 45 to 60 minute session, with the fluency component added. (NT 273)
- ¹¹ Note that results were presented in grade equivalents which are not the most robust statistics for describing a student's academic status.

123. Although at one point Jordan was at Wilson Step 11.4, Wilson instruction stopped in June 2007. Reading testing results completed by Dr. Kay after he had not had Wilson for a little over a year suggested that he had not mastered and consolidated skills at that level. (NT 293, 320-321, 376-377)
124. Jordan decodes "painfully slowly" and his reading fluency is "dismally low" suggesting that he has not consolidated the necessary skills to the level where they are automatic. There is no indication that the Wilson fluency program was included in his previous Wilson instruction. (NT 378, 380-382)
125. As regards written expression, while Wilson will address decoding, spelling and fluency, it does not address other components of writing. He requires instruction in capitalization, punctuation, grammar usage, penmanship and sentence structure. Diana King's materials fit very well with a synthetic, phonetic (Orton-Gillingham) approach for writing instruction. (NT 275)
126. Because Jordan is a dysgraphic individual who is not able to write fluently and accurately his instruction for writing should be paired with instruction in assistive technology so that he can use technologies to prepare good written reports. Technology will allow him to compensate for or circumvent his physical handwriting problems as well as his dyslexia-associated very poor spelling. (NT 276)
127. At this point Jordan would not be able to survive in a regular two or four year college. (NT 386, 389-393)
128. Despite his severe disabilities Jordan has the behavioral and personality characteristics, combined with the cognitive ability, that suggest that he will benefit from a very strong program designed specifically for smart dyslexic persons that remediates literacy skills as well as teaches compensation strategies and uses of compensatory technology. (NT 396)
129. Jordan has not yet had the solid program of literacy instruction he requires as a dyslexic person. (NT 396-397)
- IEE
130. On April 25, 2003, for its first evaluation of Jordan since his enrollment in Fenridge, the district prepared a "review of data/evaluation report". The evaluator did not administer any psychoeducational testing, but simply reviewed his report cards, the evaluations from Palisades and his IEP. (P-6)
131. Jordan's triennial evaluation by the District in April 2006 again consisted of a records review only. The school psychologist responsible for the reevaluation

132. As Jordan's previous reevaluation from April 2003 in the District was also a review of records, his last reevaluation in which a certified school psychologist actually worked with him was in August 2000 in the Palisades School District. (NT 1302-1304; S-1, S-2)

133. The District issued a Permission to Evaluate on February 29, 2008. The Parent testified that she signed the PTE at a meeting, indicating her agreement. The District claimed that it did not have a copy of this PTE, but the mother, having given permission for testing, assumed Jordan was tested as he reported being taken out of class for testing. (NT 147-149, 189-190; P-25)

134. At the May 2008 IEP meeting the special education coordinator made it clear that Jordan would have to be tested before the District could craft an IEP for the 2008-2009 school year. (NT 156-157)

135. Although she initially had requested testing, and in February 2008 had signed a PTE and later thought Jordan had been evaluated, in May 2008 the Parent learned that Jordan had not yet been tested. She was told that there would be a delay in the District's testing, so decided to obtain an IEF and informed the District of such. (NT 162-164, 191-192, 195)

136. The District offered to test Jordan on an expedited schedule, but since the Parent had contracted for Dr. Kay's services in June she did not want to cancel that appointment. (NT 192, 194-195; S-10)

137. The Parent did not incur any expense for Dr. Kay's evaluation until the actual testing, which was done at the end of July; she could have canceled the private evaluation and allowed the District to test Jordan. (NT 195)

138. Dr. Margaret Kay performed a thorough IEF that included extensive record review, test administration and processing, report writing and consultation with Jordan and his mother. (NT 307)

139. The IEF knowledgeably described Jordan's present level and his areas of need in great detail, and proposed reasonable steps toward remediation. (P-29)

140. The total charge to the Parent for the IEF which took about nine hours to complete, was \$2500.¹² (NT 307, 361)

¹² The hearing officer has used her own knowledge as a clinical and school psychologist and her familiarity with current rates for an evaluation of this type and finds this to be a very reasonable charge.

141. Landmark College is a college-based program designed for seriously dyslexic individuals which has an emphasis on intensive remedial instruction to raise skills up to where they need to be for college and instruction in how to use various assistive tools to be successful in college-level courses. (NT 274-275, 302; P-44)

142. Landmark offers a language-intensive curriculum that is intended specifically for students with average to above average intelligence, reading at a sixth grade level or below, with a diagnosis of a language-based learning disability including dyslexia, reading disorder, and/or specific learning disability. (NT 1324-1325; HO-1⁴)

143. Landmark creates a learning environment where students can actively participate in the learning process without the overwhelming obstacles caused by decoding and spelling difficulties. (NT 1328-1329 HO-1)

144. There is financial aid available for Landmark if Jordan applies for it and it is awarded. (NT 115-116)

Discussion and Conclusions of Law

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schafter v. West, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.F. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In the instant matter, the evidence was not in equipoise. The Parent met her burden of persuasion on the issues of the appropriateness of the 2006-2007, 2007-2008 and 2008-2009 school years, and the summers of 2007 and 2008. The Parent did not meet her burden of persuasion regarding reimbursement for the IHE.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion

¹³ After the hearing was concluded Jordan received an acceptance letter from Landmark, and although the letter will not be included in the record this hearing officer read it and notes its content.
¹⁴ HO-1 was first introduced by the District, and after an objection by the Parent the Hearing Officer had it marked as a Hearing Officer Exhibit for reasons she explained on the record. (NT 1292-1294)

and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹⁵ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

In this matter, this hearing officer found Jordan and his mother credible and persuasive, and having the opportunity to hear Jordan read aloud was invaluable in understanding the severity of his disability. This hearing officer also found Dr. Kay to be a highly credible and informative witness and her testimony is accepted in its entirety.

In general, the testimony of the teachers, which was heard over many hours and read over carefully in preparing this decision, and the testimony of the special education director, is not included in the findings of fact as the documents themselves speak forcefully to the issue of Jordan's being denied FAPF under the act. The witnesses who were employees of the District put forth efforts to establish that Jordan was being appropriately educated, but their extensive testimony could not outweigh the monumentally poor quality of the IEPs that represented the District's offer of FAPF. However, on many occasions that are not cited above in the findings of fact because they are not materially relevant to the ultimate conclusions, the teachers conveyed a sense of warmth and goodwill towards Jordan despite his being the subject of a due process hearing, which speaks to the character of this struggling, severely disabled young man.

The current special education teacher who is instructing Jordan in written expression was the sole District witness whose testimony clearly established that in spite of the glaringly inappropriate IEP, Jordan is receiving appropriate instruction in her area of expertise. It is unfortunate that the District did not offer this level of instruction in written expression throughout Jordan's time at Pennridge. (NT 1167-1219) Although the current reading teachers are certified as reading teachers, they are not special education teachers and neither has experience working with a dyslexic student. Although their eclectic approaches might work for a less severely disabled student, Jordan requires a complete systematic scientifically based program of reading decoding and reading fluency instruction, such as the Wilson, in order to overcome his significant handicap. The District psychologist's collegial response to Dr. Kay's evaluation was refreshing and much of his testimony served to establish the severity of Jordan's disability. This hearing officer appreciated his candor.

Special Education Foundations: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or

¹⁵ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

“IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

‘Special education’ is defined as specially designed instruction... to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child... the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

FAPF is defined as “special education and related services” provided according to the IEP. 20 U.S.C. §1401(9); 34 C.F.R. §300.17

2006-2007, 2007-2008, 2008-2009 IEPs: Having been found eligible for special education, Jordan Smith is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPF). FAPF is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit “must be gauged in relation to the child’s potential.”

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Baysshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk Rowley. The purpose of the IEP is not to provide the “best” education or maximize the

potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993).

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

The entire record demonstrates that the District offered inappropriate, skimpy, and poorly thought-out IEPs for the 2006-2007, the 2007-2008 and the 2008-2009 school years. The IEPs failed to include the most basic requirements, and were in some sections cut and pasted from the previous year's IEP in such a careless manner that the data was meaningless. In no way conceivable could any of the IEPs in evidence for the relevant years be considered reasonably calculated plans that moved from strengths and needs, to annual goals to address those needs, to methods of measuring progress toward the goals, and finally to specially designed instruction to educate Jordan so that he could accomplish the goals. Although the District produced teacher/witnesses who testified to what their courses entailed, the recurring theme of the teachers as well as the special education director would be summed up as "even if the IEP doesn't say it, we did it".

Fortunately for eligible students, IDEA case law early on (Rowley, Rose, Diamond, Polk) established that the IEP is the touchstone of a special education program and represents a contract between the Parent/Student and the District. The IEP must be reasonably calculated to produce meaningful educational benefit. In Jordan's case the IEPs were among the worst this hearing officer has seen in thirteen years and under not even the loosest standards could one infer a process of "reasonable calculation"; Jordan received very little if any educational benefit as a result. Aside from producing abysmal IEPs, the District instructed Jordan in reading, his extreme area of weakness, by using teachers who are have never taught dyslexic students, who, this school year, are not special education teachers, and who are not using a systematic, scientifically based, multisensory approach to teaching Jordan to decode and to improve his fluency. The only bright spots in Jordan's special education services during the period under scrutiny in this hearing

were the one-to-one Wilson reading program delivered during the 2006-2007 school year (and previously) by a certified Wilson tutor funded through the District, and the one-to-one instruction in writing that commenced this school year in mid-November 2008.

For all the reasons outlined in the Finding of Facts above, this hearing officer finds that Jordan was in major part denied FAPÉ and as such is entitled to compensatory education.

ESY 2007 and 2008: Regarding ESY services, the Pennsylvania Code provides, in pertinent part:

“In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors; however, no single factor will be considered determinative:

- (i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occur as a result of an interruption in educational programming (regression);
- (ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (recoupment);
- (iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives;
- (iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted; (14 Pa. Code §14.132(a)(2)(i-iv) (emphasis added).

Under no circumstances could one reasonably conclude that Jordan, a severely dyslexic individual, had mastered and consolidated the important skills of reading decoding and fluency, and encoding, at the time ESY was denied for the summers of 2007 and 2008. Moreover, although the IEPs in the relevant time periods say that the IEP team considered Jordan's need for ESY, there was not a scintilla of evidence that there was any data collected for the IEP team to review, or that there in fact had been any IEP team review. Denying Jordan ESY was inappropriate and represented a denial of FAPÉ. Therefore Jordan is entitled to compensatory education for the time periods in question.

Compensatory Education: Compensatory education is a remedy designed to provide a student with the services he should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that he should have received, compensatory education is an in-kind remedy. Lester H. v. Gillhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499

U.S. 923, 111 S.Ct. 317 (1991) A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPF.

Compensatory education will be awarded, as Jordan's inappropriate IEPs constituted a denial of FAPF for the 2006-2007 school year beginning in October 2006, the entire 2007-2008 school year, and portions of the 2008-2009 school year, and as FAPF was denied through the denial of ESY for the summers of 2007 and 2008. The hours are calculated as follows:

2006-2007 – IEP was completely inappropriate, but the District did fund the Wilson at the level the Wilson instructor specified in his communications with the District. Therefore, the award will be 3 hours per day times 160 school days¹⁶ minus the 36 weeks of private Wilson instruction at 4.5 hours per week, (3x160 minus 4.5x36) equaling **318** hours.

2007-2008 – IEP was completely inappropriate, and there was no Wilson instruction. Therefore the award will be 3 hours per day x 180 school days with no deduction since Wilson was withheld (3x180) equaling **540** hours.

2008-2009 – IEP was completely inappropriate from September until mid-November when the one-to-one writing instruction began. Therefore the award will be 3 hours per day x 50 days which is 10 school weeks (3x50) equaling **150** hours.

2008-2009 – IEP was inappropriate from mid-November until the date of this decision in mid-April in that it did not address severe reading deficits by providing the Wilson program or another systematic, scientifically-based multisensory reading program taught by special education teachers and it did not address serious math deficits as identified by Dr. Kay and by the District's own Key Math and standards tests. However, the addition of the one-to-one writing instruction was quite appropriate, albeit not well-articulated in the IEP. Therefore the award will be 2 hours per day x 100 days which is 20 school weeks (2x100) equaling **200** hours.

ESY for 2007 and 2008 – The District denied Jordan FAPF by denying the continuation of the Wilson reading program to address his most severe dyslexia, thus causing him to lose previously attained skill levels. Therefore the award will be 4.5 hours per week x 12 weeks (6 weeks per summer) (4.5x12) equaling **54** hours.

Jordan will be awarded one thousand, two hundred sixty-two (1,262) hours of compensatory education. The form of the compensatory education will be chosen by Jordan and his Parent, and may include any educational, tutorial, developmental, or therapeutic activity that will contribute toward the needs identified in Jordan's

¹⁶ October 2006 is the starting month as the complaint was filed on September 24, 2008.

evaluations and any related costs such as transportation to access these services. The hours may not be used to substitute for services that Jordan should be receiving through his IEP between now and the end of the school year. The hours may be taken singly or in blocks and may be used after school, in the evening, on weekends, and/or in the summer and may be used after Jordan turns twenty-one until he turns twenty-six. The District has the right to question the reasonableness of the cost of a service if it is not in line with the usual and customary rate for the service in the geographical area. The total cost of all the services must not exceed the total cost the District would have borne (salaries and all benefits) if it were providing Jordan with the appropriate program and services. The parties are encouraged, and may decide, to convert the compensatory education award into a monetary amount which Jordan and his Parent may use to supplement any grants or subsidies Jordan may receive from Landmark College or OVR or other sources.

This hearing officer has decided to fashion a compensatory education award expressed in number of hours rather than tuition reimbursement for Landmark College, although she believes that Landmark would offer Jordan an appropriate program. This decision was based on several factors, primarily including 1) a lack of conviction that a higher reviewing body would affirm an award of tuition to a college, even if the student were not enrolled in college level courses; 2) reluctance to award the residential costs given that Jordan does not require a 24-hour residential setting; and 3) concern that should family circumstances, health reasons, or other factors cause Jordan to leave Landmark before finishing the program, he would lose the benefit of the award. As noted above, it is anticipated that the parties could choose to convert the compensatory education hours into a fund; this would permit the Parent and Jordan to use the award to supplement whatever grants in aid he receives through Landmark or any other college offering remedial courses, and/or any assistance provided through OVR, to cover tuition, living, books/materials and transportation expenses.

Independent Educational Evaluation: A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the parent initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

The conditions under which a Parent may be reimbursed for an IEB are specific, and this hearing officer recognizes the Parent's sense of urgency given Jordan's age, and understands that the quality of past evaluations by the District might have raised concern in the Parent for the quality of the evaluation the District proposed to conduct. Given Dr. Davidson's demeanor and the quality of his testimony which conveyed his professionalism, it is likely that had he been permitted to conduct a full evaluation it would have been appropriate, although the Parent may or may not have agreed with the conclusions. Nevertheless, the fact remains that the Parent "jumped the gun" by obtaining her own evaluation before the District could conduct its evaluation. Therefore, the cost of

the IEF will not be reimbursed, although Dr. Kay's evaluation provided a very valuable addition to the Parent's case in these proceedings and was a worthwhile investment.

Order

It is hereby ordered that:

1. The Pennridge School District denied Jordan Smith FAPE for school years 2006-2007 and 2007-2008.
2. As the Pennridge School District denied Jordan Smith FAPE for the 2006-2007 and/or the 2007-2008 school years, he is entitled to compensatory education.
3. The IEF the Pennridge School District offered to Jordan Smith for the 2008-2009 school year is not appropriate.
4. The Pennridge School District improperly denied Extended School Year (ESY) services to Jordan Smith for the summers of 2007 and 2008.
5. Jordan is entitled to one-thousand two hundred sixty-two (1,262) hours of compensatory education as explained above.
6. The Pennridge School District is not required to reimburse Ms. Smith for the Independent Education Evaluation conducted by Dr. Margaret Kay.

April 8, 2009
Date

Linda M. Valentini, Psy.D.
Linda M. Valentini, Psy.D.
Hearing Officer