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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

5961/05-06 KE

File Number

Child's Name

Date of Birth

11/30/05, 1/13/06

Dates of Hearing

Closed

Type of Hearing

For the Student:

Mr. and Mrs. Parent

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Dates of Hearing:

Date of Receipt of Last Transcript:

Date of Decision:

Hearing Officer:

November 30, 2005, and January 13, 2006

January 18, 2006

February 2, 2006

Daniel J. Myers

BACKGROUND

Student is a xx year old, sixth grade resident of the Western Wayne School District (School District) who was identified by the School District in November 2005 with attention deficit disorder (ADD) and a specific learning disability in the areas of reading, basic math, and written expression. His parents contend that the School District should have identified, and programmed for, Student's disability as early as September 2004. For the reasons described below, I find for the Student.

ISSUES

Whether or not Student is entitled to compensatory education for any period since September 2004 due to a denial of a free and appropriate public education (FAPE)?

FINDINGS OF FACT

1. Student is a xx year old, 6th grade resident of the School District with attention deficit disorder (ADD) and a specific learning disability in the areas of reading, basic math, and written expression. (SD 1) ¹

2001-2002, Second Grade

2. In Summer 2001, between his first and second grade school years, Student attended the School District's summer school for reading instruction. (N.T. 32-33)
3. During the 2001-2002 (2nd grade) school year, Student's parents obtained a private tutor who tutored Student twice per week in reading. Student's 2nd grade teacher regularly sent materials home for Student and his tutor to work on. In addition, Student's parent and teacher spoke on the telephone up to three times per week to discuss academic and behavioral concerns. (N.T. 34-36)
4. The School District's version of an instructional support team (IST) process starts with a Student Concerns team, comprised of the guidance counselor and elementary school teachers that discusses a teacher's concerns regarding particular children and suggests accommodations within the regular education setting for that child. (N.T. 165, 184, 267)
 - a. If the child does not progress with the Student Concerns team's suggestions, the next step is the Child Study team, comprised of the guidance counselor, teachers, principal, school psychologist and the Supervisor of Special Education. (N.T. 165, 267)
 - b. The Child Study team recommends actions, which might include an educational evaluation. (N.T. 166-167)

¹ References to SD, P and HO are to School District, Parent and Hearing Officer exhibits, respectively. References to N.T. are to the transcripts of the November 30, 2005, and January 13, 2006 hearing sessions.

- c. When the School District becomes aware that a child already has an evaluation report, then the School District bypasses the Student Concerns meeting goes directly to the Child Study team discussion of the Student. (N.T. 267)
 - d. Parents do not attend either Student Concern or Child Study team meetings. (N.T. 189)
5. Before Christmas 2001, Student's parent asked the School District's guidance counselor for "learning disability testing." (N.T. 37)
- a. Student's parent testified that the guidance counselor responded that Student would be placed "on the list" for such testing. (N.T. 37, 99)
 - b. The guidance counselor, who could not remember having such discussions, acknowledges that he might have told Student's parent that Student would be placed on "the list." (N.T. 207, 213)
 - c. He testified, however, that he would not have been referring to a special education evaluation list. (N.T. 207, 213) The guidance counselor testified that any reference that he might have made to Student's parent regarding a "list" would have been to either the elementary school's Student Concern list or to its Child Study list. (N.T. 207, 213)
 - d. The School District's principal and school psychologist testified that, if the guidance counselor had received from Student's parents a request for a special education evaluation, he would have informed them. They testified that they did not receive such information from the guidance counselor. (N.T. 273, 350)
 - e. Whenever a parent requests an evaluation, the School District evaluates the student. (N.T. 372)

2002-2003, Third Grade

6. On September 12, 2002, a Child Study team reviewed Student's academic performance and decided:
- a. To administer the Wide Range Achievement Test (WRAT);
 - b. To confer with Student's parent regarding Student's need for eyeglasses; and
 - c. To consider further testing after reviewing the WRAT results. (P 2; SD 13; N.T. 168, 330)
 - d. Although the WRAT was administered, the record does not contain any WRAT results. (N.T. 212, 330, 378)
7. In October 2002, Student's parents withdrew Student from the School District's public schools and enrolled Student in the [Redacted] Charter School. (N.T. 41, 66, 169, 170) Student attended the Charter School for the remainder of his 3rd grade and for all of his 4th grade school years. (N.T. 66)
8. In February and March 2003, while Student was still in 3rd grade at the Charter School, his parents privately secured an evaluation by Dr. H, Director of Psychological Services for [Redacted] Hospital. (N.T. 106; P 3; SD 15)
- a. Dr. H is a licensed psychologist who has tested over 1,000 students during his career. (N.T. 107-108)

- b. Standardized tests of intelligence indicated average cognitive abilities. (N.T. 116) Standardized achievement testing indicated average math, basic reading and written expression skills, and low average reading comprehension skills. (N.T. 120; SD 15, pp.8-9)
- c. Executive functioning and behavioral rating scores were consistent with attention deficit disorder. (SD 15, pp.14-18)
- d. Dr. H found a moderate weakness in reading, particularly with sustained comprehension, and mild weaknesses in spelling. He diagnosed a Reading Disorder and ADD. (N.T. 122; SD 15, p. 18)
- e. Dr. H recommended behavior management strategies and a follow up with the family's physician regarding ADD medication. He also recommended that Student "continue with his current academic placement, but [with] selective accommodations and adaptations as delineated below." (N.T. 122; SD 15, p. 18)
- f. Dr. H testified that, if Student had been in a public school setting, he would have recommended that the public school monitor Student's reading and provide a Section 504 plan to address Student's attentional issues. (N.T. 122, 128-129, 138) Dr. H testified that he did not include these recommendations in his Spring 2003 report because he believed that the Charter School would not have provided either special education or a Section 504 plan. (N.T. 135)

2004-2005, Fifth Grade

- 9. On or about August 31, 2004, Student re-enrolled in the School District. (P 5) Student's parent gave to the guidance counselor a copy of Dr. H's Spring 2003 evaluation report. (SD 15; N.T. 45-46, 171)
- 10. On or about September 16, 2004, the Child Study team met to review Dr. H's Spring 2003 evaluation report. (N.T. 173, 175, 224; P 8; SD 13)
 - a. Consistent with School District policy described above, the School District skipped the Student Concerns meeting and went straight to the Child Study meeting because Student already had an evaluation report. (N.T. 173, 270, 278)
 - b. The guidance counselor cannot remember reviewing Student's earlier, September 2002 Child Study records, nor can he remember reviewing the WRAT that the School District had administered. (N.T. 208, 211)
 - c. The Child Study team clearly understood from Dr. H's report that Student had ADD, but concluded that Student was not in need of either specially designed instruction or accommodation. (N.T. 352-353)
- 11. The Child Study team assigned Student to the elementary school's strategic Fifth Grade classroom. (N.T. 173, 216, 271; SD 13)
 - a. The elementary school has an accelerated Fifth Grade class, a traditional class, a strategic class, and a learning support class. (N.T. 283, 286) Students with IEPs are assigned to the learning support class. (N.T. 289) None of the children in Student's strategic class had IEPs. (N.T. 234-235)

- b. Student's strategic Fifth Grade classroom had 13 students who struggled with reading. (N.T. 219, 228) Adults assigned to this classroom were an experienced teacher and a reading specialist. (N.T. 201)
 - c. Student's strategic Fifth Grade classroom used the same Harcourt Trophies reading curriculum as all other 5th grade classes, but it moved at a slower pace and it utilized the publisher's supplemental intervention materials. (N.T. 218-219, 281-282) The publisher's supplemental intervention materials included shorter stories, easier questions, and a consumable workbook. (N.T. 222)
 - d. Student was also provided with Title One reading services and a Classroom Plus after-school reading assistance program. In all, Student received at least two hours per day in reading instruction. (N.T. 202, 205, 232, 301-302; P 16)
 - e. No more Child Study team meetings occurred for Student after September 2004. (N.T. 315)
12. On September 27, 2004,² Student's parent met with School District personnel to discuss Student's performance. (N.T. 175; SD 13) Teachers were aware of Student's ADD diagnosis, and they were happy with Student's progress. (N.T. 176-177)
13. The School District believes that Student performed well during his first two marking periods, with good attitude, enthusiasm and academic success. Student's reading comprehension grades were in the high 70s, which is a passing grade and is typical for students assigned to the strategic Fifth Grade classroom. (N.T. 224-225, 228)
14. During the 3rd marking period, Student began having difficulty with focusing, and his reading comprehension suffered as a result. (N.T. 228-229) The School District attributed this drop in academic performance to a medication change because Student had just switched ADD medications to avoid headache side effects. (N.T. 92, 176, 229, 231; P 9, pages 2-4)
15. During the 4th marking period, Student's academic performance improved, apparently confirming School District suspicions that Student's medication change was the cause of his diminished 3rd marking period performance. (N.T. 178, 231; P 9, pages 2-4)
16. Toward the end of 5th grade, Student's parent testified that she told the principal that she was concerned about Student moving to the middle school the following school year, and Student's parent wondered whether she should send Student to a parochial school or a charter school. Student's parent testified that the Principal said she'd think about the question and, the following week, the principal recommended that Student's parent investigate the [Redacted Facility] which, according to Student's parent, is a partial hospitalization program. (N.T. 55, 94) Although the principal did testify at the hearing, she did not testify regarding this alleged conversation.

² Although the minutes of this meeting are dated "9/27/05," this date contains a typographical error. This parent/teacher conference actually occurred on September 27, 2004. (N.T. 209)

2005-2006, Sixth Grade, Middle School

17. On or about July 25, 2005, Student's parent requested, in writing, an evaluation and psychological testing for Student. (P 13; P 14; N.T. 57, 100; SD 3)
18. On August 19, 2005, the School District responded by requesting written permission to evaluate Student. (P 14; SD 2)
19. On October 18, 2005, Student's parent requested a due process hearing. (SD 16)³
20. On November 14, 2005, the School District issued its Evaluation Report (ER). (P 17; SD 1; N.T. 327)
 - a. The ER concluded that Student has a specific learning disability based upon a severe discrepancy between ability and achievement in reading fluency and comprehension skills, math computation skills, and written expression skills. (SD 1, p.3) A corresponding occupational therapy (OT) evaluation recommended OT services. (SD 1, p. 7) The ER also noted that Student has Other Health Impairment (OHI) based upon a previous diagnosis of ADD. (SD 1, p. 7)
 - b. The School District's ER conclusions are consistent with Dr. H's conclusions with regard to Student's reading needs. (N.T. 371) In contrast to Dr. H's report, the School District's ER also concludes that Student has some deficits in math skills. (N.T. 372)
 - c. Student did not take ADD medication during the evaluation period. Accordingly the School District psychologist considers the ER to be an accurate evaluation of Student's abilities and performance in an unmedicated setting. The School District psychologist believes that Student's test results would have been higher if Student had been medicated during the testing period. (N.T. 343-344; SD 1)
21. On the date of the first hearing session in this matter, November 30, 2005, no IEP team meeting had yet been scheduled. (N.T. 62)
22. Hearings in this matter were scheduled for November 30 and December 15, 2005, and January 13, 2006. At the November 30 hearing session, the School District requested continuance of the December 15 hearing session to accommodate the schedule of its Supervisor of Special education. Because Student did not object, I granted the request. (N.T. 18)
23. I conducted a due process hearing in this matter on November 30, 2005 and January 13, 2006. Parent Exhibits 1, 2, 4-18 were admitted without objection. (N.T. 385) School District Exhibits 1, 3, 8, 10, 13 and 15 were admitted without objection. (N.T. 383)

³ Although this document is in the binder of School District exhibits that were available for use at the hearing, it was not offered, and therefore it was not entered, into the record. Nevertheless, I cite to it as support for the date of the hearing request, and I hope that this date will not be a material, disputed fact on appeal – if there is an appeal.

Credibility determinations

24. The objective testing results and disability conclusions in Dr. H's 2003 report and in the School District's 2005 ER are credible and consistent with each other. (SD 1; SD 15) Dr. H's apparent recommendation that Student be placed in a regular education setting rather than receive either special education or Section 504 accommodations is not credible, however. Dr. H's misunderstanding regarding the public nature of a charter school, as well as his suggestion that he based his report's recommendations upon the school's capacities (rather than solely upon the Student's needs regardless of the school's capacities), undercuts the credibility of that part of his report. (N.T. 122, 128-129, 135, 138)
25. The testimony of Student's parent is credible that, throughout Student's 2nd grade and during his brief 3rd grade tenure, she repeatedly asked the guidance counselor for testing of Student. (N.T. 37) The guidance counselor could not refute that Student's parent requested testing, nor could he refute his alleged response, i.e., that Student would be placed "on the list." (N.T. 37, 99, 207, 213) I do not believe that Student's parent used the specific words "special education testing." It was reasonable for Student's parent, however, to believe that the guidance counselor was referring to a testing list.
26. The testimony of Student's parent is credible that, at the end of Student's 5th grade school year, she asked the elementary school principal for any recommendations regarding the following middle school year. The principal testified, but she was not asked to confirm or refute this alleged conversation. (N.T. 55, 94) Because the principal appeared credible and competent at the hearing, I doubt that she recommended a partial hospitalization program for Student, whom the principal understood to be a regular education student. As I explain in the discussion section of this decision, however, the principal's response is not as important as the fact that the conversation occurred at all.
27. This decision is issued:
- a. 107 days after the due process hearing request;
 - b. 20 days after the last hearing session; and
 - c. 15 days after receipt of the transcript of the last hearing session.

DISCUSSION

The School District is required – under both federal and state laws – to seek out all children with disabilities within its jurisdictional boundaries and offer a free appropriate public education ("FAPE"). This mandate is known as "child find. 22 Pa. Code §14.121; 34 C.F.R. §300.125; In Re the Educational Assignment of J. A., Special Education Opinion No.1325 (2003); In Re the Educational Assignment of A. K., Special Education Opinion No. 1316 (2003) Child find is a positive duty and is the "absolute foundation" of FAPE. In Re the Educational Assignment of J. G., Special Education Opinion No. 1292 (2002); In Re the Educational Assignment of R. B., Special Education Opinion No. 874 (1999)

In November 2005, the School District recognized that Student is a child with disabilities who is entitled to special education and related services. Student argues that the School District should have recognized this much sooner. The School District contends that it had no reason to evaluate Student sooner than it did. I disagree.

First, Student's parent credibly testified that, throughout Student's 2nd grade and during his brief 3rd grade tenure, she repeatedly asked the guidance counselor for testing of Student. (N.T. 37) Unfortunately, the guidance counselor unreasonably interpreted this as a request that Student be placed into the Student Concerns/Child Study loop, and not as a request for psychoeducational testing. This is not a case, however, in which a parent casually remarked, once, that she'd like her child tested. The unrefuted testimony is that Student's parent made the request repeatedly, albeit imprecisely, and that the guidance counselor's consistent response was that Student would be placed on "the list." (N.T. 37, 99, 207, 213, 273, 350, 372) Under those circumstances, and particularly where, apparently, the School District evaluates a child whenever a parent requests an evaluation (N.T. 372), the School District should have initiated the evaluation process sometime between the first parental requests before Christmas 2001 and Student's withdrawal from the School District in October 2002.

Second, when the Child Study team did get around to discussing Student in September 2002, it properly decided to conduct some objective testing, i.e., a WRAT. (P 2; SD 13; N.T. 168, 212, 330, 378) Those WRAT results are not in the record in this case. (N.T. 212, 330, 378) The combination, however, of the September 2002 decision to administer a WRAT, with the November 2005 ER conclusion that Student does, indeed, require special education and related services, convinces me that the School District could have understood Student's needs sooner, and could have programmed for those needs sooner, if it had been more responsive to the initial 2001-2002 requests of Student's parent for testing.

Third, when Student returned to the School District in September 2004, it immediately convened a Child Study team because Student's parent presented Dr. H's Spring 2003 evaluation report. (P 3; P 8; SD 13; N.T. 45-46, 171, 173, 175, 224, 270, 278) That Child Study team now had before it: 1) knowledge of parents' consistent requests for testing; 2) the September 2002 WRAT; and 3) Dr. H's evaluation report diagnosing ADD and a Reading Disorder, and recommending various classroom accommodations. (N.T. 122; SD 15, p. 18) Why would reasonable educators not also recommend that the School District conduct its own educational evaluation?

Perhaps the answer lies in two examples from the hearing. First, when the principal was asked on cross-examination whether or not circumstances might not suggest a referral for a special education evaluation, she responded, "No, we would not make a recommendation to go directly to special ed. We needed to learn about the student." (N.T. 310) In fact, however, an evaluation might have been useful for "learning about the student" and it is not the equivalent of going "directly to special ed" programming. Second, School District witnesses made it clear that, at least during Student's 5th grade 2004-2005 school year, children with IEPs were assigned to the learning support class, struggling children without IEPs were assigned to the strategic classroom, and (in my words) "never the twain shall

meet.” (N.T. 234-235, 289) Perhaps these examples of a possible lack of flexibility in School District culture explain why it was so slow in evaluating the Student in this case.

The School District also appeared to suggest that it was not required to evaluate Student because he appeared to be progressing satisfactorily in the regular education setting. I reject this argument.

ADD is specifically listed as one of the health problems that may constitute the disability defined as “OHI” in the federal regulations, and SLD also specifically defined. 34 C.F.R. §§ 300.7(c)(9)(i); 300.7(c)(10) A two-part test applies for determining whether a student is entitled to an individualized education program (IEP) as a result of having either OHI or a specific learning disability (SLD). 34 CFR §§300.7(c)(10), 300.541(a)(2) First, the student must meet the regulatory definition of SLD or OHI. Second, the student must “by reason thereof, need[s] special education and related services.” 22 Pa. Code §14.101; 34 C.F.R. §300.7(a)(1); In re the Educational Assignment of V.D., Special Education Opinion No. 1413 (2003); In Re B.C. v. Quakertown School District, Special Education Opinion No. 1303 (2002); In Re M. M. v. School District of Philadelphia, Special Education Opinion No. 1019 (2000)

There is no precise standard for determining whether a student is in need of special education. Grades alone, however, cannot serve as an IDEIA litmus test for determining whether or not a Student with a disability is “in need of” special education services. West Chester Area School District v. Bruce and Suzanne C., 194 F. Supp. 2d 417 (E.D. Pa. 2002) So how does one know whether or not a child with a specific learning disability needs specially designed instruction? There is no precise standard or any bright-line rules for making such a determination. The mere use of accommodations and modifications in the regular education classroom does not automatically demonstrate that a child needs specially designed instruction. In Re K. J. v. Fox Chapel School District, Special Education Opinion No. 1302 (2002) (extended time for tests and use of books on tape)

This is an unnecessary analysis, however, because the question is not whether or not Student needed special education services prior to November 2005, but whether or not he should have been evaluated before then. (As I noted earlier, an evaluation is not the equivalent of an eligibility determination.) Student had received summer school instruction between 1st and 2nd grades, he received privately secured tutoring in 2nd grade, he had a privately secured psychologist’s 2003 diagnosis of reading disorder and ADD, he received substantial school-based accommodations throughout his regular education 5th grade school year, and his parent and principal had discussed parental concerns about Student’s future middle school years. While all of these factors do not conclusively indicate that Student ever actually needed specially designed instruction before the November 2005 ER was conducted, they certainly form a sufficient basis for evaluating Student sometime before November 2005.

Indeed, the November 2005 ER supports the position that Student should have been identified sooner as a child with disabilities who is in need of special education and related services. First, that ER acknowledges that Student has both ADD and SLD, and that he is in

need of both specially designed instruction and related services (OT). Second, the School District's November 2005 ER testing results are consistent, at least with respect to Student's reading and attentional needs, with Dr. H's Spring 2003 evaluation report. Thus, it is reasonable to conclude that if the School District had evaluated Student in Spring 2003, it would have reached conclusions similar to the conclusions that it eventually reached almost 2 and ½ years later in its November 2005 ER. In other words, had the School District evaluated Student sooner, it would have recognized Student's confirmed needs for special education and related services sooner.

Compensatory education is an available remedy when the School District either fails to provide FAPE to a child with a disability, or simply fails to provide the services that it had agreed to provide. See Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238 (3rd Cir., 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir., 1996); In re the Educational Assignment of J. P., Special Education Opinion No. 1132 (2001) Clearly, Student is in need of special education services to address his reading, math and written expression deficits, as well as related services to address his OT needs, and I determine today that these needs would have been identified sooner if Student had been evaluated sooner. I conclude that, as a result of the School District's failure to evaluate and program for Student's needs sooner, Student has been denied a free and appropriate public education since his reenrollment into the School District in September 2004. Accordingly, I will award compensatory education for the period of time since September 2004.

It would be much easier for me to calculate an appropriate amount of compensatory education if the IEP team had already met and determined the amount of special education and related services that Student needs now. I probably could just take that IEP team determination, assume that Student would have needed substantially the same services in the past, and calculate the compensatory education award (minus the reasonable grace period allowed to School Districts for rectifying FAPE denials.) In this case, however, the record simply contains evaluation reports describing and confirming Student's academic and OT deficits (SD 1; SD 15), but not indicating the length and nature of services necessary to address those needs.

Thus, I determine that, if the School District had started the evaluation process at the time of its September 2004 Child Study meeting, then it would have concluded its evaluation and conducted an IEP team meeting at least by January 2005, in time for the Spring 2005 semester. I further estimate that Student's IEP team would have been likely to program one hour per day of learning support services to address his reading, math and written expression needs, and 30 minutes per week to address his OT needs. Accordingly, I will award 198 hours of compensatory education for the period January 2005 to January 2006, which is the equivalent of 5.5 hours per week of compensatory education for one year (36 weeks).

Conclusion

The School District should have evaluated Student sooner than it did. Had it paid closer attention to the requests of Student's parent for testing, to its own WRAT testing, and to Dr. H's reading disorder and ADD diagnoses, it would have started the evaluation process one

year sooner than it did and, most likely, it would have reached its conclusion that Student is indeed, in need of special education and related services one year sooner than it did. Accordingly, I award 198 hours of compensatory education for one year of FAPE denial.

ORDER

For the reasons described above, I hereby ORDER that Student is entitled to 198 hours of compensatory education services;

Daniel J. Myers
Hearing Officer

February 2, 2006

Re: Due Process Hearing
File Numbers 5961/05-06 KE
Student

School District