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Due Process Hearing

KM (#7426/06-07 AS)  
Date of Birth: xx/xx/xx  
Date of Hearing: May 3, June 5 and 13, 2007  
Closed Hearing

Parties to the Hearing

Parent  
Mr. and Mrs.

Representative  
Pamela E. Berger, Esq.

Transcript Completed  
June 20, 2007  
Date of Decision  
June 25, 2007

School District  
McGuffey

Representative  
Patricia R. Andrews, Esq.

Hearing Officer  
David Y. K. Lee

## **II. BACKGROUND**

Student is a xx-year-old, 11<sup>th</sup> grade student during the current 2006-2007 school year, in the McGuffey School District (hereafter District). Student was identified early in her school career as a Learning Disabled student and has been receiving special education services since the latter part of her third grade year. The parents were dissatisfied specifically with her progress in reading and requested a due process hearing claiming compensatory education for the denial of a free appropriate public education (hereafter FAPE).

## **III. FINDINGS OF FACT**

1. Student, date of birth xx/xx/xx, is a student in the District. (D. #9.)
2. Student was initially evaluated, and found to be an eligible student, when she was in second grade but the parents chose not to have special education services. (N.T. 20, 117. D. #12 @ 1. P. #12 @ 5.)
3. Following parental consent, in the latter part of third grade, Student began receiving Learning Support (hereafter LS) services. (N.T. 20-23. P. #12 @ 5.)
4. In ninth grade, Student's Individualized Education Program (hereafter IEP) showed LS services in English, Math, Social Studies, and Science. (N.T. 252-253. P. #4 @ 3, #5 @ 3 & 26.)
5. The ninth grade IEP, dated October 25, 2004, contained two short-term objectives in Reading - "Student will complete study guides/chapter activities/activity sheets given a reading assignment", "Student will identify vocabulary in a given assignment". (P. #5 @ 17-19.)

6. Reading “tutoring” by a special education teacher was to be provided during homeroom in the morning without identifying specific instructional goals on the IEP.

(N.T. 251-252. P. #5 @ 3.)

7. Additional reading goals were added on March 21, 2005. (D. #4 @ 11-12.)

8. In tenth grade, Student was enrolled in the Health Assistant Program at the [redacted] Center for three credits. (N.T. 57-58, 253. P. #9 @ 5. D. #6.)

9. The specific focus of “tutoring” in Reading, which began in ninth grade, shifted to assistance with assignments from the Health Assistance Program upon parent request. (N. T. 209-210. P. #9 @ 6.)

10. Student’s tenth grade IEP, dated November 21, 2005, contained two annual goals in Reading based on reading fluency and comprehension of selections from English literature or the content area to be implemented in the LS English class. (N.T. 211. P. #9 @ 11.)

11. Student’s “tutoring” on the Health Assistance material was terminated upon parent request in February of Student’s tenth grade year. (N.T. 212-214. D. #7 @ 4.)

12. Student began her eleventh grade year, continuing from tenth grade, without separate reading instruction beyond her placement in LS English. (N.T. 254-255. D. #7 @ 8-11.)

13. An eleventh grade IEP, dated September 25, 2006, eliminated the reading fluency goal from the previous IEP without clarification. (D. #9 @ 32-35.)

14. On October 11, 2006, a full period of reading “tutoring” was added to Student’s IEP without including any specific reading goals. (N.T. 220-221. D. #9 @ 15-16.)

15. On March 5, 2007, the eleventh grade IEP was revised to include reading goals within the Wilson Reading System (hereafter WRS). (N.T. 222-224. D. #9 @ 4-8.)

16. A request for due process hearing was received in the Office for Dispute Resolution on March 6, 2007. (ODR file.)

17. Hearing sessions were held on May 3, June 5<sup>1</sup>, and 13<sup>2</sup>, 2007.

#### **IV. ISSUES**

1. Was Student denied FAPE? (N.T. 5, 14.)

2. Is Student entitled to compensatory education? (N.T. 7.)

#### **V. DISCUSSION AND CONCLUSIONS OF LAW**

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<sup>1</sup> The parties agreed to convene at the [location redacted, town redacted], PA in order to accommodate the parent. (N.T. 137.)

<sup>2</sup> The parties agreed to submit Closing Statements in writing by June 20, 2007. (N.T. 296-297.)

The IDEA has a limit of two years in alleged violations before the date of the complaint filing.<sup>3</sup> Counsel for the parents filed the complaint by letter to the District dated March 4, 2007. Considerations by this Hearing Officer will, therefore, be from March 5, 2005, to the end of the current 2006-2007 school year. After careful review of the case on the whole, it is unequivocal that the parents are concerned with Student's difficulties with Reading and are dissatisfied with Student's progress in Reading. (N.T. 288-289.) Although Student was receiving LS services in other subject areas (N.T. 252-255. F.F. #4.), the present analysis will be focused only on the provision of Reading. It is evident to this Hearing Officer that the District and the parent had numerous contacts and meetings over the course of time for various different reasons. These meetings resulted, pertinent to the present case, in a number of modifications to Student's IEPs, entered as Exhibits, which need to be sifted through in order to see the progression of services from one year to the next.

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<sup>3</sup> 34 CFR §300.507(a)(2).

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. An IEP is one that meets the procedural and substantive regulatory requirements and one that is designed to provide meaningful educational benefit to the child.<sup>4</sup> The test of appropriateness is whether the IEP is sufficient to confer “some” educational benefit. School districts are not required to provide the optimal level of services.<sup>5</sup> However, a program which confers only trivial or minimal benefit is not appropriate.<sup>6</sup>

#### 2004-2005 school year

On March 5, 2005, Student was a ninth grade student with an IEP dated October 25, 2004. (P. #5.) Special education instruction specifically in Reading was described as “tutoring” during Student’s homeroom period. (N.T. 176.) The homeroom period was for 24 minutes at the beginning of the school day. (N.T. 177.) 34 CFR §300.320(a)(2)(i) states that an IEP must include—

“A statement of measurable annual goals, including academic and functional goals designed to--  
(A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and...

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<sup>4</sup> Rowley v. Hendrick Hudson Board of Education, 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>5</sup> Carlisle School District v. Scott P. 62 F.3d 520, 533 (3d Cir. 1995).

<sup>6</sup> Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

The IEP goals contained two short term objectives associated with Reading. They were general statements about completing activities and identifying vocabulary in reading assignments. Without clear baselines given with the objectives or elsewhere in the IEP, it is difficult to understand how progress could be measured. Furthermore, the expected 60% level of achievement can hardly be considered mastery or even instructional. In any event, the goals were written on October 8, 2004, and meant to be incorporated into Student's LS English class since there was not a separate LS Reading class.<sup>7</sup> (N.T. 187-188. P. #5 @ 17.) The present levels section of the IEP states "Student will complete a reading profile in order to determine specific reading goals and objectives. Once the profile is completed the IEP team will meet and write specific goals and objectives". (N.T. 202-203. P. #5 @ 3.) This further illustrates the lack of baselines to determine identified instructional objectives in meeting Student's needs in the area of Reading. Student has been receiving LS services for a number of years and her reading difficulties were not in dispute. It is indeed curious that the District needed to obtain a "reading profile" after all those years in special education. It is the determination of this Hearing Officer that on March 5, 2005, Student's IEP was not appropriate due to the lack of measurable goals in Reading both in her LS English class and in her "tutoring". (N.T. 186.)

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<sup>7</sup> The term "tutoring" apparently was used by the District instead of LS Reading which apparently does not exist at the High School level.

The IEP team reconvened on March 21, 2005, and reading goals were added which referred to fluency rates. There were four short term objectives with two of them referring to the task of word identification. (N.T. 178-179, 204, 208. D. #4 @ 12.) The other two short term objectives contained a reference to Student's instructional level without identifying the specific level. Thus, it is uncertain how the objective of "given a list of 20 words, Student will identify the prefix and suffix" can be operational and measured. (D. #4 @ 11.) The District may opine that Student's instructional level was contained in the assessment data listed under present levels. This Hearing Officer notes that such data were from the previous October and November. Student scored 92% on the 100 Instant Word List in November. The expected goal of 95% can hardly be considered meaningful progress. (D. #4 @ 4-5.) Even if the instructional level is self-evident amidst the various numbers, goals should be able to be implemented without the need to search elsewhere and ascertain their specifics. Furthermore, the goals for Reading in LS English remained unchanged at a 60% expected achievement level. (D. #4 @ 14.)

Therefore, it is determined that Student's reading goals were vague making them unmeasurable in accordance with 34 CFR §300.320(a)(2) for March 5, 2005 to the end of the 2004-2005 school year in the LS classroom and in "tutoring". The expected levels of achievement also did not indicate meaningful progress.

2005-2006 school year



Upon parent request at the beginning of the school year, the homeroom period “tutoring” was used to help Student with materials from the Health Assistance Program. (F.F. #8.) The “tutoring” during homeroom was discontinued entirely on February 6, 2006, again upon parent request so that Student could use that time to receive help from her LS teacher in Biology. (F.F. #11.) Reading goals, determined to be unmeasurable, incorporated in LS English continued from the previous school year until the IEP revision meeting date of November 21, 2005.<sup>8</sup> Two reading goals were added with measures of fluency and comprehension. (F.F. #10.) The reading fluency goal was identified as “ 100 wcpm on level 4 probes on 3 consecutive trials”. This was arrived at based presumably on the Dibels timed median of 88 wcpm. (N.T. 192. P. #9 @ 6.) Setting a goal of 12 more wcpm at the fourth grade level for the year would hardly seem to be meaningful progress for a tenth grade student. What is the benchmark for a tenth grade or even a fourth grade student? This Hearing Officer notes that Student’s ninth grade IEP showed a goal of 130 wcpm, albeit at a different level. (D. #4 @ 12.) The present levels entries also contained a number of scores from one year ago. There was no substantiation of their relevance to the IEP. It is indeed uncertain how the District would consider progress in the area of fluency when it went from 88 wcpm in October to 90 wcpm in May, as noted in the report of progress. (N.T. 216. D. #8 @ 6.) The District also opined that Student made progress as demonstrated by her grades and standardized achievement scores. (N.T. 216. D. #1, #2, #6.) Collaborating data in progress monitoring to substantiate the differential on the

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<sup>8</sup> It is curious to note the IEP has an implementation date of 11/1/05 which is prior to the meeting date of 11/21/05. (P. #9 @ 1.)

TerraNova were not offered. (N.T. 94, 190.) The reading portion of Student's IEP is, therefore, determined to be inappropriate. This constitutes half of the LS English period for the entire tenth grade year.

2006-2007 school year

In eleventh grade, Student's IEP was revised on September 25, 2006. (D. #9 @ 17.) Student was continuing in the Health Assistance Program and without the specific homeroom "tutoring" in Reading. (F.F. #12.) The goal of reading fluency was not continued from her previous IEP even though Student had not met the goal of 100 wcpm. (N.T. 219. D. #8 @ 6, #9 @ 32.) It is difficult to understand why the IEP reading goals were not consecutive from one year to the next especially since Student had been receiving LS services since third grade. Again, there should have been a good understanding of her levels and specific skills deficits from one year to the next, or from one IEP to the next, in spite of having different teachers. Assessments are expected to be an on-going instructional process to determine, in the least, progress and form the baselines for subsequent IEP goals. This apparently did not occur as the present levels of Student's IEP again contained old data or scores that cannot be translated into instructional goals addressing specific skills deficits. (D. #9 @ 22-24.)

On October 11, 2006, “tutoring” in reading was initiated for one period a day. This revision was noted on an IEP front sheet added to the existing IEP. (D. #9 @ 15.) Reading goals, however, were not developed for “tutoring”. (F.F. #14.) Testimony was given to the effect that again some informal assessments were done, and the WRS was purchased. (N.T. 221.) Specific reading goals were not developed until March 5, 2007, referencing the WRS. (F.F. 15.) Student, therefore, did not have appropriate IEP goals for Reading from the beginning of the school year to March 5, 2007.

### Compensatory education

Compensatory education is a remedy that is appropriate when an eligible student has been denied a free appropriate public education. Compensatory education is an equitable remedy for FAPE violations.<sup>9</sup> For the inappropriate and lack of measurable reading IEP goals, Student was denied FAPE. Compensatory education will be based on 24 minutes per homeroom “tutoring” period and 42 minutes per class period. (N.T. 166, 252.)

There were 56 school days from March 5, 2004, to the end of the 2004-2005 school year. (H.O. #2 @ 1.) During that time, Student was absent for the equivalent of 7 days. (H.O. #2 @ 1.) Compensatory time owed is  $(49 \text{ days} \times 42 \text{ mins./day}) + (49 \text{ days} \times 24 \text{ mins./day})^{10} = 3234 \text{ minutes}$ .

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<sup>9</sup> See Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), cert denied, 499 U.S. 923, 111 S.Ct. 317 (1991). Also M.C. ex rel. J.C. v. Central Regional School District, 81 F.3d 389, 108 (3d Cir. 1996).

<sup>10</sup> The “tutoring” log entries (D. #5) do not correspond exactly with the attendance summary (H.O. #1 @ 1). The values used are felt to be close approximations taking into consideration school activities, homeroom coverage (N.T. 251), missing entries (N.T. 232-233).

For the tenth grade year, Student was not in school for 22 days (12 excused, 9 un-excused, 1 field trip) out of 180 school days. (H.O. #1 @ 3.) Compensatory time owed is  $(158 \text{ days} \times 42/2 \text{ mins./day}) = 3318 \text{ minutes}$ .

For the eleventh grade, there were 118 school days before March 5, 2007. (H.O. #2 @ 3.) During that time, Student was not in school for 32 days (22 excused, 1 field trip, 9 un-excused). (H.O. #1 @ 5-6.) Compensatory time owed is  $(86 \text{ days} \times 42 \text{ mins./day}) = 3612 \text{ minutes}$ .

The total compensatory education owed is therefore  $(3234 + 3318 + 3612) = 10,164 \text{ minutes}$  or 169.5 hours. Such hours are to be in addition to Student's IEP (school day) and may not be used to replace such services. The parents may select the form of the compensatory education as long as it provides for the further development of Student's reading skills. The costs to the District in the provision of the compensatory education may not exceed a special education teacher's salary (including fringe benefits) for the same period in which Student was denied FAPE.

#### Additional comments

The need for emotional support and assistive technology were mentioned in the opening statement. (N.T. 7.) In reviewing the available record, facts are not in evidence to substantiate such.

Student received grades of mostly As and Bs in school, albeit in LS for her major subject areas. (N.T. 252-255. D. #6.) In the Health Assistance Program, Student “was able to complete most work independently” and received a grade of B in spite of being absent for 56 days. (N.T. 263. D. #9 @ 20.) Student’s strengths have been described over time as “self-motivated, completes assignments, works independently, stays on task, organization skills”. (N.T. 226-229. D. #9 @ 24.) The parents did not dispute such descriptors.

An assistive technology evaluation was conducted on September 12, 2004, which found Student not to be in need of such. (P. #12 @ 3.) Accommodations were provided in the Health Assistance Program. (N.T. 259-263.)

Lastly, in the interest of Student, the parties are urged to work together to develop an IEP, and make the necessary arrangements for compensatory education, before the start of the 2007-2008 school year in order for Student to complete her Senior year with consistency and without interruptions. The District’s re-evaluation, regardless of when it is supposed to be due (N.T. 100, 296. P. #16 @ 10.), should be finalized without delay in order to assist in the revision of the IEP. If the parents had obtained additional evaluation information/data, such should be forwarded to the District to be considered in the evaluation report.

Accordingly, it is hereby ordered:

**VI. ORDER**

The LEA is ordered to take the following action:

The District is ordered to provide Student with 169.5 hours of compensatory education consistent with the Discussion above.

June 25, 2007

Date

David Y. K. Lee

David Y. K. Lee  
Hearing Officer