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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION ON REMAND

DUE PROCESS HEARING

Name of Child: LC
ODR #5713/05-06 KE
Date of Birth: xx/xx/xx

CLOSED HEARING

Parties to the Hearing:

Parent

School District of Philadelphia
440 N. Broad Street, 3rd Floor
Philadelphia, Pennsylvania 19130

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Frederick Stanczak, Esquire
179 North Broad Street
Doylestown, Pennsylvania 18901

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School District of Philadelphia
440 N. Broad Street 3rd Floor
Philadelphia, Pennsylvania 19130

January 28, 2007

February 11, 2007

Linda M. Valentini, Psy.D.

Background

Student graduated from a School District of Philadelphia (hereinafter District) high school in June 2004. From kindergarten on Student had been identified as an eligible student with learning disabilities in need of learning support. At a due process hearing held on November 1, 2005 and December 21, 2005 Ms. xx, Student's mother (hereinafter Parent) asserted that Student had never been provided with a free appropriate public education (FAPE), specifically in the areas of reading and mathematics, during the entire time Student was a student in the District. The Parent also asserted that Student was not provided with an appropriate transition plan from the time Student turned 16 years old, and that this continued to be a detriment to Student as of the time of the hearing. The Parent was requesting compensatory education for the alleged denial of FAPE for the 2000-2001 through the 2004-2005 school years¹. The District asserted that it provided Student with special education programs designed to meet Student needs and that Student made "steady progress although ...not substantial progress" (NT 13). The District also asserted that it provided Student with a vocational program in high school to aid Student's transition. The District held that in considering any compensatory education award the hearing officer was bound by the limitations established by Montour School District v. S.T., 805 A.2d 29, 40 (Commw. Ct. 2002).

For reasons which are explained in the original decision, but which will not be recounted here, the parties agreed that the date of an original due process request that did not result in a hearing would be honored. That date, April 6, 2005, was prior to the implementation date of the IDEIA (IDEA 2004)² and therefore, following Montour this hearing officer limited recovery to one year from the filing date, that is back to April 5, 2004. However, the parties were allowed to present evidence going back further than April 5, 2004 so that the record would be available for later review if necessary.

In a January 15, 2006 decision this hearing officer addressed the specific period from April 5, 2004 until April 6, 2005. However, as Student graduated from high school in June 2004, the period of recovery was therefore limited to the period from April 5, 2004 through the end of the 2003-2004 school year in June 2004, a period of 45 school days. Finding that the District had not offered Student a free, appropriate public education during the period under consideration, this hearing officer awarded Student compensatory education. The Pennsylvania Special Education Appeals Panel affirmed the decision (Opinion No. 1700, February 2006).

On October 26, 2006, the parties met with the United States District Court for the Eastern District of Pennsylvania and entered into a stipulated order for remand to the special education hearing officer. The Office for Dispute Resolution received a copy of the Stipulation and Order on January 23, 2007 and electronically forwarded it, along with the

¹ Dates articulated in Parent counsel's letter to the District dated April 6, 2005. (Appendix I)

² The IDEIA was implemented on July 1, 2005. A limited but growing body of case law interprets it to limit recovery to two years prior to the filing of a hearing request unless two specific exceptions exist.

hearing transcripts, to this hearing officer. The documents used in the hearing were sent to this hearing officer in a hard copy version by mail and arrived the evening of January 28, 2007.

Issue

The Stipulation and Order remands the matter to the administrative process “to determine the entitlement, if any, of Student to compensatory education prior to April 6, 2004, as well as the nature and amount of any such compensatory education award”.

Although the remand order could be interpreted to require going back to the beginning of Student’s education in the District, as a practical and equitable matter, and in accord with the Parent’s original complaint, this decision will address school years 2000-2001, 2001-2002, 2003-2004, and the portion of 2004-2005 not addressed in the original decision, that is, up through April 5, 2005.

In addressing this issue the following questions will be considered:

1. Did the District offer Student a free appropriate public education in the area of reading?
2. Did the District offer Student a free appropriate public education in the area of mathematics?
3. Did the District offer Student a free appropriate public education in the area of transition planning?

Findings of Fact

1. Student is a xx-year-old graduate of the District.
2. In the 2003-2004 school year Student was in 12th grade and graduated in June 2004 by accumulated credits. (NT 20, 209)
3. Student attended school in the District from kindergarten through Student’s graduation after 12th grade. (NT 172)
4. Student repeated kindergarten and in March 1993, during Student’s second time in kindergarten, Student was evaluated and found to have a learning disability. (NT 170; P-2)
5. According to the Wechsler Intelligence Scale for Children – Third Edition (WISC-III) administered in March 1993 Student’s IQ levels were as follows: Verbal IQ 94, Performance IQ 99, Full Scale IQ 99, all Average Range. (P-2)

6. The school psychologist noted in the Evaluation Report that WISC-III subtests revealed average to superior skills on tasks requiring vocabulary development, common sense reasoning and verbal abstraction.³ (P-2)
7. Around this time Student was also found to have Attention Deficit Hyperactivity Disorder (ADHD). (NT 171)
8. As Student moved through the years Student received Cs, Ds and Es on Student's report cards. (NT 175)
9. Student received reading tutoring from a family acquaintance, a former teacher, in the summer prior to Student's entering 9th grade. The unpaid tutoring took place twice a week, for 75 minutes each session, over a four-week period. (NT 189-195; P-4)
10. On September 5, 2000 the teacher/tutor wrote a letter addressed to the School Administrator reporting that given the Dolch list of basic words for beginning reading Student miscalled or refused 15% of these words. (P-4)
11. The teacher/tutor reported that Student needed "considerable" help with phonics. He noted, "[Student] must master the sounds of all consonants, vowels, digraphs, diphthongs, blends" and commented that this was "pretty basic stuff". (P-4)
12. The teacher/tutor recommended that "any reading program Student receives at school should "provide instruction at [Student's] instructional level with no reservations" and noted that Student needed one-on-one help. (P-4)
13. The teacher/tutor described some reading instruction techniques that had been successful with Student, noted Student's ability to memorize the Frost poem Stopping By Woods on a Snowy Evening to assist reading and noted Student's "enormous" enjoyment of a high interest level version of Dickens' novel Great Expectations. (P-4)
14. During Student's 9th grade year Student's courses were delivered in the Mixed Categorical Program (MCP) wherein, although the students moved from class to class, they were with a Learning Support Teacher for all the major academic subjects. (NT 26; S-1, S-1a)
15. During 9th grade Student made more total academic progress in reading and math combined than Student would make in any of Student's other high school years. Student progressed from a 2.1 reading level to a 4.1 reading level and from a 3.3 math level to a 3.9 math level. (S-6, S-7)

³ This hearing officer notes that these skills are tapped by the Vocabulary, Comprehension and Similarities subtests respectively.

16. However, for Student's 10th grade year Student was moved to a Functional Learning Support (FLS) program, sometimes called a minimal cycling class wherein the student is with one or two teachers all day instead of going around the building from class to class. Students are moved from MCP to FLS if the progress has been minimal for whatever reason or if the attendance has not been good. The program provides more support and fewer distractions. (NT 30-31; S1, S-1a)
17. In 11th grade Student was moved to the Learning Support Vocational Program (VOC), wherein Student spent half Student's day at the high school attending classes and half Student's day at a community work experience. Student remained in this track for 12th grade as well. (NT 33; S-1, S-1a)
18. According to the Special Education Coordinator/LEA Representative the high school IEP teams did not look at or address Student's ADHD, as "the document that we looked at was from middle school and it was addressed in middle school". (NT 135-136)
19. Student's 11-8-00 9th grade IEP contains pecially designed instruction as follows: peer tutoring, one-on-one teacher assistance, extended time to complete assignments and verbally state responses. (S-7)
20. Student's 12-11-01 10th grade IEP contains pecially designed instruction as follows: extended time, read questions aloud, use of calculator, simplified directions, repeated directions. (S-6)
21. Student's 12-18-02 11th grade IEP contains pecially designed instruction as follows: extended time, guided practice, read questions aloud, use of a calculator, simplified directions, repeated directions, note taking. (S-3)
22. Student's 12-4-03 12th grade IEP contains pecially designed instruction as follows: extended time, verbal testing, guided practice, read questions aloud, simplified directions, repeated directions, use of calculator, concrete materials. (S-2)
23. Student's 11-8-00 9th grade IEP contains a reading annual goal for Student to progress from reading level 2.1 to level 3.0. The Benchmark "Use word recognition skills" is paired with the objective of "Given a selection, Student will employ reading strategies such as context clues and linguistic cues, and making meaning using prefixes, suffixes, roots inflectional endings, etymologies". (S-7)
24. Student's 12-11-01 10th grade IEP contains a reading annual goal for Student to progress from reading level 4.1 to a 4.5/5.0 reading level⁴. The short-term objectives are to write paragraphs of 3 to 7 sentences using proper grammar and

⁴ Despite Student having made a two-year gain in reading by the end of the expiring IEP.

- punctuation⁵, to answer open ended questions and logically and coherently demonstrate comprehension of the material read, and to develop a sight vocabulary and utilize phonics rules to assist with the decoding of words⁶. (S-6)
25. Student's 12-18-02 11th grade IEP contains a reading annual goal for Student to progress from reading level 4.1 to a 5.0 reading level⁷. The short-term objectives are to answer questions about a reading selection at Student's reading level, to write a paragraph using correct spelling, grammar and punctuation, and to make inferences, predict outcomes and draw conclusions from a selection at Student's reading level. (S-3)
26. Student's 12-4-03 12th grade IEP contains a reading⁸ current level of 4.6, but the annual goal is simply for Student to "improve comprehension⁹ across all academic and vocational curricula". The short-term objectives are to restate or summarize information given a selection at Student's reading level, to write a 4 to 6 sentence paragraph¹⁰ containing an opening sentence, supporting ideas, closing or summary statement, correct grammar, capitalization and punctuation. (S-2)
27. Student's 11-8-00 9th grade IEP contains a math annual goal for Student to progress from math level 3.3 to level 4.0. One Benchmark is "Use the properties of addition, subtraction, multiplication, division, equalities and finding roots in forming and working with algebraic equations". This is paired with objectives of solving subtraction problems involving regrouping, solving multiplication problems¹¹, solving division problems¹², using a calculator for problems "with basic operations". A second Benchmark involves "explain(ing) the structure of standard measurement systems, both metric and customary, including derived units, unit conversions and dimensional analysis", however the objectives simply require Student to set an oven at a stated temperature and to use a kitchen timer or clock. (S-7)
28. Student's 12-11-01 10th grade IEP contains a math annual goal for Student to progress from math level 3.9 to a 4.5/5.0 math level. The short term objectives

⁵ The MAST does not test written expression. The Special Education Coordinator/LEA Representative who testified believed that the teacher determined Student's baseline level. She was unaware whether or not a rubric was used for writing. (NT 99-100)

⁶ There is no differentiation in the present level of educational functioning in reading as to whether Student's phonics skills are at a different level than Student's sight word skills. (NT 102)

⁷ Note that this annual goal is at the same level as that in the previous year's IEP as Student made no progress.

⁸ There is no differentiation between reading decoding and reading comprehension. There is no baseline therefore for comprehension. (NT 146)

⁹ The meaning of "comprehension" is unclear. The District's witness testified that this referred to comprehension across content areas of science, social studies, English and language arts. (NT 145-146)

¹⁰ The 10th grade IEP specified sentences of three to seven sentences. The complexity of the sentences in either IEP is not noted and no baseline is given in the IEP to gauge progress. (NT148-150; S-3, S-6)

¹¹ Type and difficulty level unspecified.

¹² Type and difficulty level unspecified.

- are to correctly multiply problems using 1 and 2 digits, to correctly divide problems using 1 and 2 digits¹³, to correctly add and subtract fractions. (S-6)
29. Student's 12-18-02 11th grade IEP contains a math annual goal for Student to progress from math level 4.6 to a 5.0 math level. The short-term objectives are to multiply and divide fractions¹⁴, to correctly do problems "of open-ended questions and consumer math"¹⁵, and to correctly do "problems with money"¹⁶. (S-3)
30. Student's 12-4-03 12th grade IEP contains a math current level of 4.7, but the annual goal is simply for Student to "increase math skills to the next level"¹⁷. The objectives are to multiply one and two digit numbers with regrouping¹⁸, to divide a two digit number by a one digit integer¹⁹, ²⁰ and to compute one digit math problems and word problems with decimals and money sums²¹. (S-2)
31. Student was not taught reading using an Orton-Gillingham approach. Student was not taught with the Wilson reading program. Student's IEP team did not consider using this kind of approach for Student although, per the Special Education Coordinator/LEA Representative, "at that time period there was a lot of discussion with the IEP teams of staff in the school being trained in Wilson". (NT 97-98)
32. Student was not taught math using a structured math program designed for students with learning disabilities in the area of math, such as the Saxon Math Program. The high school's Special Education Coordinator/LEA Representative who participated in Student's 12th grade IEP has not heard of the Saxon Math Program and could not recall the names of any other specific math programs for learning disabled students. (NT 85-86)
33. The manner in which Student was taught reading and math did not change from the 11th grade IEP to the 12th grade IEP. (NT 153)
34. Student's expected level of achievement of Student's 12th grade IEP objectives in English and Language Arts was 70%. Student's expected level of achievement in math was 65%. (S-2)

¹³ Whether the 1 or 2 digits are in the divisor or the dividend is not specified.

¹⁴ Not further specified.

¹⁵ Not further specified.

¹⁶ Not further specified.

¹⁷ Not further specified. The District witness said that this meant to the 5th grade level, "around 5.2 or three". (NT 151)

¹⁸ Note that this appears to be the same objective as was contained in the 10th grade IEP two years earlier.

¹⁹ Note that this appears to be a lower level of division than in the 10th grade IEP two years earlier.

²⁰ Note that both the multiplication and division objectives appear to be at a lower level than those contained in the 11th grade IEP which called for multiplication and division of fractions.

²¹ Not further specified. The District's witness did not know the level of the problems. (NT 152-153)

35. At the end of 11th grade and the beginning of 12th grade the Parent asked “if someone could work more with [Student] with [Student’s] math because [Student’s] math skills are real bad...[Student] doesn’t even count change...that’s exactly what I said. ‘My [child] can’t even count change to go to the supermarket’”. (NT 183-184)
36. Although she attempted to help Student with Student’s homework the Parent did not know how to assist Student. (NT 187-188)
37. Student’s IEPs during Student’s four years of high school record achievement levels in reading and in math as assessed by the MAST (Multi-level Academic Survey Test) as follows: (NT 49-53; S-2, S-3, S-6, S-7)

IEP Date/ Grade	Reading Present Level	Math Present Level
11-8-00 Grade 9	2.1	3.3
12-11-01 Grade 10	4.1	3.9
12-18-02 Grade 11	4.1	4.6
12-4-03 Grade 12	4.6	4.7

38. Student made no progress in reading between the middle of 10th grade and the middle of 11th grade.²² (S-3, S-6)
39. The IEP written in the middle of 11th grade contains no goals or objectives addressing reading decoding. The word “decoding” is not checked under specially designed instruction. The Special Education Coordinator/LEA Representative testified that “Well her reading levels had a deficit but I don’t know that that was a method being used. It didn’t appear that that method²³ was being used any longer to instruct [Student]”. (NT 110-112; S-3)
40. According to the Special Education Coordinator/LEA Representative, around the time Student’s 11th grade IEP was developed instruction in decoding stopped in the District in favor of a “word recognition” approach, or “whole word instruction”. (NT 113-114)
41. In the absence of decoding instruction, Student was likely to have been required to read high interest material that was written at a 5th grade level when Student’s reading level was at the beginning 4th grade. (NT 114-117)
42. The projection for progress in math during the tenure of the 11th grade IEP was unclear. In fact, Student went on to make only one month of progress in math between the middle of 11th grade and the middle of 12th grade. The Special Education Coordinator/LEA Representative concluded that this was meaningful progress for Student. (NT 118-121, 136-137; S-2, S-3)

²² The IEP notes that Student’s attendance was good that year. (NT 107; S-3)

²³ The “method” to which she was referring is unknown.

43. Although Student made no reading progress from 10th to 11th grade the 11th grade IEP notes that Student had good attendance, contributed to discussions in class and was a good worker at Student's assigned community service placement. Student was putting forth effort and had a good attitude. (NT 140-141; S-3)
44. Although according to the 12th grade IEP there seemed to be a change in Student's attitude, attendance²⁴ and motivation the District did nothing to examine why this might be the case. (NT 141-145, 163)
45. The 11th grade IEP Transition Plan notes under Post Secondary Training that "course catalogues and materials are available at high school. OVR counselor will meet with Student to do intake". There is no indication of how Student will be assisted to read the catalogues. Under Employment the plan notes that "Student will do community service to learn about the different types of employment. Student will develop and increase work skills and job getting skills". There is no notation about how the District will help Student develop and increase skills and what these skills may be. Under Community Living the plan notes that Student will increase Student's daily living skills but there is no indication of what skills Student needs to increase and how Student will be assisted. Under Community Participation Student is to "continue participation in the community service learning" and write and present Student's community service learning project. Even if Student could effectively write Student's project it is unclear how this would contribute towards Student's transition post high school. Under Recreation there is a notation that Student participates in some recreational activities and that an unspecified person (Student?) will "look into the [redacted] Center for further activities". (NT 124-134; S-3)
46. The Vocational goal in the 11th grade IEP was to follow a sequence of directions to complete projects or tasks and the objectives were to complete a three-part task with 90% accuracy and to interact appropriately with the assisted living residents 100% of the time. There is no indication of how the goal and the objectives were established. Specially designed instruction listed was guided practice, concrete materials, simplified directions and repeated directions. (S-3)
47. There was no one person designated to see that the Transitional Services Plan was implemented. (NT 134-135)
48. As part of Student's 11th grade vocational program Student worked in food services and in recreation at an assisted living facility. The teacher did some travel training with the students and the teacher or an assistant teacher accompanied the students as a liaison between the facility and the school. (NT 34)
49. The 12-4-03 12th grade IEP contains a minimal Transition Plan that assigns exclusive responsibility to Student under all service descriptions. Under "Post

²⁴ Student's attendance was poor throughout high school. (S-8)

- Secondary Training” (trade school or technical training) the Plan notes “materials and information available at [the high school]”. Under “Employment” (competitive) the Plan notes, “develop and increase academic and work skills”. Under “Community Living” (residential) the Plan notes, “develop and increase daily living skills and habits”. Under “Community Living” (participation) the Plan notes “give service/volunteer in community”. Under “Community Living” (recreation) the Plan notes, “pursue activities of interest”. (S-2)
50. Although Student would love to be a veterinarian, or work as a veterinary assistant, or work in a pet shop or volunteer in an animal shelter Student cannot count money or give change and cannot fill out an application on Student’s own. (NT 209, 238, 259)
51. Student’s spelling skills are so poor that Student does not instant message Student’s friends on the computer or send text messages on the telephone.²⁵ (NT 254-255)
52. A neuropsychological evaluation performed in February 2004²⁶ found Student’s cognitive ability to be at the upper end of the Low Average Range. Student’s scores on the Wechsler Adult Intelligence Scale – Revised (WAIS-R) were Verbal IQ 85, Performance IQ 96, and Full Scale IQ 89. (P-5)
53. The neuropsychologist noted that “over the years Student’s verbal IQ has not kept pace with individuals of Student’s general age category” and “It is argued that[Student’s] deficits in reading and long-standing ADHD factors have been principal reasons for this drop”. (P-5)
54. The neuropsychological evaluation report notes in regard to math and remedial reading, “Given Student’s substandard skills in these two subject areas, [Student] requires assistance with computation logic and especially phonetic reasoning or word recognition tasks. Student is in dire need of a reading literacy training program to enable [Student] to reach 6th grade levels, since most written materials/documents, such as magazines and newspapers are written on this level”. (P-5)

Credibility of Witnesses

During the hearing that formed the basis of the original decision, this hearing officer found the District’s sole witness not to be credible and concluded that her testimony

²⁵ These means of communication currently permeate teenage and young adult subcultures, becoming more typical among friends than talking on the telephone.

²⁶ Although this evaluation was not considered in the original decision because the hearing officer had some questions for the examiner and he was not available for testimony, the information contained in this and the subsequent two findings of fact is outside the area about which the hearing officer would have questioned the neuropsychologist.

supported the Parent's case in helping to establish the inappropriateness of Student's IEPs. The Parent testified credibly, and her demeanor suggested that she simply lacked the internal resources she would have needed to muster to challenge the District in any effective manner through the years.

Discussion and Conclusions of Law

Legal Basis

This matter began before and concluded after the United States Supreme Court issued its decision in Schaffer v. Weast, 1005 WL 3028015 (U.S. Nov. 14, 2005), ruling that the burden of persuasion rests with the party bringing the claim in special education cases. Although the evidence in this matter was not determined to be closely balanced, in writing the original decision in January 2006 this hearing officer weighed the evidence according to the burden being with either party when reaching her decision and came to the same conclusion. For purposes of the current remand decision the burden of proof was assigned to the Parent.

The events in this case unfolded under the IDEA 1997, therefore all cites reference that statute and/or its implementing regulations.

When Student was enrolled in the District Student was an eligible handicapped student, and as such was entitled to the protections of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1412, and its implementing regulations (34 C.F.R. Part 300), and Chapter 14 of the Pennsylvania Code. The IDEA requires that states provide all eligible students with a free appropriate public education (FAPE). FAPE 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 IEP.

An appropriate IEP is one that meets the procedural and substantive regulatory requirements and is designed to provide meaningful educational benefit to the child. (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.”

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... (Emphasis added) CFR §300.347(a)(1) through (4)

Regarding transition planning, the IDEA’s regulatory provision defining transition services states:

“(a) As used in this part, *transition services* means a coordinated set of activities for a student with a disability that –

- (1) Is **designed within an outcome-oriented process**, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (2) Is **based on the individual student’s needs, taking into account the student’s preferences and interests**; and
- (3) Includes –
 - (i) **Instruction**;
 - (ii) Related services;
 - (iii) Community experiences;
 - (iv) The development of employment and other post-school adult living objectives; and
 - (v) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(b) Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if required to assist a student with a disability to benefit from special education.” 34 CFR § 300.29. (emphasis added)

As for the process of transition planning, the regulations further provide that:

“(1) For each student with a disability beginning at age 14 (or younger, if determined appropriate by the IEP team), and updated

annually, a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program); and

(2) For each student beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.” 34 CFR § 300.347(b).

Discussion

As per Diamond and Polk, an IEP must be likely to produce progress, not regression or trivial educational advancement, and must afford the student with special needs an education that would confer meaningful benefit. This educational benefit “must be gauged in relation to the child’s potential.” Student’s high school IEPs were inappropriate, and all but one failed to confer meaningful educational benefit to Student in relation to Student’s potential. Gauging from the testimony of the District’s Special Education Coordinator/LEA Representative the District had lost sight of Student’s cognitive potential, not surprising since there was no evidence that Student had ever received any follow-up cognitive testing from the District after Student’s kindergarten scores had been obtained.

An examination of the IEP’s under consideration reveals significant deficits in the areas of 1) present levels of educational functioning (largely attributable to use of a reevaluation instrument, the MAST, which provides no differentiation among whole word reading, reading decoding and reading comprehension and no differentiation among math calculation, math concepts, and math applications); 2) goals and objectives (which do not begin to address Student’s severe deficits in reading and math); 3) projections for progress (which are vague, useless, and not measurable); 4) standard for achieving the objectives (unacceptably low for a student of average intelligence); 5) specially designed instruction (lacking provisions for structured programs in reading and math that are designed to teach these subjects to individuals with severe learning disabilities)²⁷ and 6) failure to address Student’s ADHD with goals/objectives, or specially designed instruction to assist Student with organization and focus.

The District characterized Student’s attendance as good at the time of the 11th grade IEP, but the cumulative attendance report suggests chronic attendance problems. There is no evidence that the District, at any time in Student’s high school career, ever offered Student counseling or referred Student for outside therapeutic assistance. Given Student’s average intelligence and Student’s very low levels of reading and math it is to

²⁷ Although the District was discussing the Wilson but did not yet have trained Wilson providers, there was no attempt to procure this program for Student from a private provider. Although she was familiar with, but could not recall the name of, math programs other than the Saxon specifically for learning disabled individuals, the District’s witness testified that the IEP team upon which she sat did not recommend one for Student. Notably, this IEP did not address Student’s ADHD with goals/objectives, or

Student's credit that Student actively participated in class in late 10th grade and early 11th grade, according to her 11th grade IEP.

Regarding transition planning, this hearing officer continues to find herself in complete agreement with the Parent's attorney who summed up the problem in his closing statement when he described the plans included in the IEPs as "haphazard, at best", seeming to be "based upon what was available and not upon Student's actual interests". There is no evidence that there was any attempt to determine Student's interest and aptitudes at any point after Student filled out an interest inventory in middle school. As Parent's counsel also points out, the transition plan does not address Student's actual needs and abilities and does not address the obstacles that would prevent Student from attaining Student's post-school objectives. Just as the work-related settings chosen for Student do not reflect any obvious attempt to match Student's area of interest, Student's unsuccessful experiences in two settings were not processed with Student in such a way as to assist Student to learn from Student's mistakes.

In the previous Decision, this hearing officer found a very significant deprivation of FAPE, and constrained by Montour awarded as large an amount of compensatory education as was reasonable for the forty-five day recovery period (six hours per day for the entire forty-five days within the scope of this hearing, regardless of whether Student was present every day, for a total of 270 hours). This hearing officer continues to find a significant deprivation of FAPE, but given the more equitable recovery period of three and a half years, will award compensatory education accordingly, leaving undisturbed the 270 hours of compensatory education already awarded, but redistributing the new award so as to take the previous award into account. The period under consideration for this decision begins in September 2000 and continues through April 5, 2004. Acknowledging the guidance contained in Special Education Opinion 1700, which she finds eminently reasonable, the calculus is presented as follows:

First, applying the Third Circuit's reasonable rectification period²⁸ which Pennsylvania Special Education Appeals Panels have usually found applicable²⁹ the District is granted a 60 school day period during which, had it recognized the program as articulated in the IEP it was offering Student was not appropriate, it could have revised the IEP. Thus, counting approximately 20 school days per month given autumn holidays, report card conference days and teacher in-service days, the period under consideration for compensatory education will begin on December 1, 2000. Further, compensatory education will be limited to the estimated time for the particular services of reading instruction, mathematics instruction, and transition services³⁰. Further, a reduction for absenteeism, which is also a factor in Student's case, will be made.³¹ Finally, the award

²⁸ *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

²⁹ *See, e.g.*, Special Educ. Opinions Nos. 1648 (2005) and 1628 (2005); *cf.* Special Educ. Opinion 1680 (2005); 1672 (2005), and 1604 (2005) (special circumstances).

³⁰ *See, e.g.*, Special Educ. Opinions Nos. 1672 (2005), 1644 (2005), 1636 (2005), 1628 (2005), and 1612 (2005).

³¹ *See, e.g.*, Special Educ. Opinion No. 1604 (2005); *cf.* Special Educ. Opinions Nos. 1651 (2005) and 1423 (2003) (only for days in attendance).

for the 12th grade year will be adjusted to reflect the large amount of hours given for the portion of the year covered in the previous decision

For 9th, 10th and 11th grades whether or not compensatory education was awarded is based on a combination of the appropriateness of the IEPs (which in all the years under consideration were inappropriate) and whether or not Student made meaningful educational progress (as reflected in the only available standardized measure, the MAST). As MAST scores were not available by which to evaluate Student's progress in 12th grade, and this hearing officer does not consider the WRAT-R achievement scores in the neuropsychological evaluation to be robust indicators of reading and mathematics ability, the 12th grade entitlement is based on the patent inappropriateness of the IEP.

December 2000 through June 2001: (9th Grade)

Reading: No compensatory education due, as Student made considerable progress in this area despite an inappropriate IEP.

Mathematics: No compensatory education due, as Student made marginally adequate progress in this area despite an inappropriate IEP.

Transition: No compensatory education due.

September 2001 through June 2002: (10th Grade)

Reading: 45 minutes per day for every day Student was present in school.

Mathematics: No compensatory education due, as Student made marginally adequate progress in this area despite an inappropriate IEP.

Transition: No compensatory education due.

September 2002 through June 2003: (11th grade)

Reading: 45 minutes per day for every day Student was present in school.

Mathematics: 45 minutes per day for every day Student was present in school.

Transition: 30 minutes per day for every day Student was present in school

September 2003 through April 5th, 2004: (12th grade)

Reading: 45 minutes per day for every day Student was present in school.

Mathematics: 45 minutes per day for every day Student was present in school.

Transition: 30 minutes per day for every day Student was present in school.

The total hours will be reduced by 180 hours to factor in the large number of hours previously awarded when only a limited time period was under consideration. The reduction by 180 hours is calculated as follows: 270 hours were awarded previously for a 45-day period in the 2003-2004 academic year. Considered in the context of the current decision, a 45-day period in the 2003-2004 academic year would yield a total of 90 hours (2 hours per day x 45 days). Thus the excess hours (270 minus 90) equal 180 hours.

The hours of compensatory education must be used for reading assessment and instruction, and math assessment and instruction, provided by individuals who are trained and certified in programs proven to be effective with adults who have average intelligence but who are learning disabled. Unlike the restrictions placed upon the

previous award, this hearing officer now expands her order with respect to the current award, such that the compensatory education ordered herein may also be used for vocational training leading to post-secondary employment.³² Student may utilize these hours past the time when Student turns 21, but Student must utilize them prior to Student 26th birthday. This limitation is being imposed to encourage Student to devote the next five years, Student's early adulthood, to developing academic and vocational skills that will enable Student to be self-sufficient throughout the remainder of Student's adulthood. This period of time is consistent with the time period that typically developing peers acquire postsecondary education and training.

As provided in the previous decision, although the final selection of the provider(s) of compensatory education is Student's and Student's mother's choice, it is strongly recommended that Parent's counsel assist them in locating and selecting the provider(s). The total cost of the compensatory education may not exceed the total cost of the salaries, benefits and associated costs that the District would have expended in providing Student with an appropriate reading program, an appropriate math program and an appropriate transition program during the period(s) addressed by this decision.

³² This hearing officer is well aware of the guidance on compensatory education awards provided in B.C. by J.C. v. Penn Manor School District, 106 LRP 48033, 1150 C.D. 2005, August 15, 2006 wherein the Court encourages a "flexible approach" based on the facts of the case rather than "meaningless hour counting". However, in the opinion of this hearing officer, addressing the complexity of what kinds of compensatory services in what amounts and for how long, would be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" invites in the instant matter virtually unlimited disputation and further squandering of resources on litigation in lieu of education. Thus the simplest approach was chosen, and this hearing officer leaves the planning and execution of Student's remediation to the student and the parent in collaboration with their special education attorney and any educational consultants he believes can be of assistance.

ORDER

It is hereby ORDERED that for portions of the period under consideration:

1. The [District] did not offer Student a free appropriate public education in the area of reading.
2. The [District] did not offer Student a free appropriate public education in the area of mathematics.
3. The [District] did not offer Student a free appropriate public education in the area of transition planning.
4. As the [District] did not offer Student a free appropriate public education in reading, math or transition planning for portions of the period under consideration, she is entitled to compensatory education as detailed above.
5. These hours must be used for reading assessment and instruction, and math assessment and instruction, provided by individuals who are trained and certified in programs proven to be effective with adults who have average intelligence but who are learning disabled, as well as for vocational training leading to post-secondary employment. Student may utilize these hours past the time when Student turns 21, but Student must utilize them prior to Student's 26th birthday.
6. Although the final selection of the provider(s) is Student's and Student mother's choice, it is strongly recommended that Parent's counsel assist them in locating and selecting the provider(s). The total cost of the compensatory education may not exceed the total cost of the salaries, benefits and associated costs that the District would have expended in providing Student with an appropriate reading program, an appropriate math program and an appropriate transition program during the period(s) addressed by this decision.

February 11, 2007
Date

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