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Decision

Due Process Hearing for Student
Date of Birth: []
File Number: 5950/05-06

Dates of Hearings:
December 2, 2005; January 20, 2006; February 17, 2006

CLOSED HEARING

Parties:

Mr. and Mrs. Parents
[]
[]

Representatives:

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Date Transcript Received:
Date of Decision:
Hearing Officer:

February 22, 2006
March 4, 2006
David F. Bateman, PhD

I. BACKGROUND

Student is a fourth grade student in the Schuylkill Haven School District (hereinafter District) eligible for special education and related services as a student with a learning disability. The Parents and the District participated in a previous due process hearing and subsequent appeal relating to her identification and eligibility for special education and related services. A part of the Appeals Panel decision included an Order for the District to complete a reevaluation. The District completed an educational evaluation, and found Student no longer eligible for special education and related services. The Parents disagreed with the findings of the District's evaluation report. The District requested the present due process hearing for determining whether Student was eligible for special education and related services.

The Parents moved to have the Hearing dismissed having appealed the other part of the Appeals Panel decision to Federal Court.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on []. Student is currently xx years of age (S-2).
2. Dr. T completed a psychoeducational evaluation of Student in July 2003. Her report found that Student had dyslexia and dysgraphia (P-10, p. 21).
3. Student was found eligible for special education and related services in October 2003 (S-2, p. 10). The District recommended her eligibility as a student with a learning disability, and that Student needs help in class despite Student trying really hard.
4. The District developed an IEP on December 2, 2003 (S-3). This IEP provided for Student's education with the assistance of a learning support teacher. A NOREP was developed (S-3, p. 18) providing for Student to receive supportive intervention in a regular classroom.
5. Reporting of progress indicates Student made progress on Student's goals and objectives in the spring of 2004 (S-4).
6. Student is currently in fourth grade (NT 23).
7. Student was identified as a student with a specific learning disability in second grade (NT 23-24).
8. The parties participated in a previous due process hearing (P-14) with a subsequent appeal. The Hearing Officer found the student no longer eligible for special education and related services on April 26, 2005 (S-5). The

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents' evidentiary exhibits will be designated "P" followed by the relevant exhibit number.

Appeals Panel found²: The District shall complete an educational evaluation as described earlier in this opinion within 30 days of the beginning of the school year. The District shall reconvene a meeting of a properly constituted IEP team to prepare a new IEP consistent with conditions specified earlier in this order and Commonwealth law (S-5, p. 19).

9. The Parents filed a Motion to Dismiss relating to the present due process hearing (P-20). The Parents Motion avers the Hearing Officer lacks jurisdiction to hear the present matter. Additionally, parts of the previous matter are in Federal Court (P-2, P-7).
10. Progress reports for Student on Student's IEP goals and objectives indicate on going/appropriate progress being made in June 2005 (S-20).
11. The District sought permission to evaluate on July 6, 2005 (S-6). The Parents disagreed with the evaluation.
12. The District continued to seek a reevaluation of the student on July 22, 2005 (S-8). The Parents sought clarity about the specific assessments that were to be used and the language of the request to the Parents (S-9).
13. The Parents requested the Student's PSSA results on August 4, 2005 (S-10). The Student's scores on the PSSA's indicated Student scored in the advanced level in reading and mathematics (S-15).
14. The District sent a letter to the Parents on August 24, 2005 relating to a desire for remedial reading programming for the student (S-11). Remedial reading was included in the pendent IEP (NT 33).

² *In re: A.D. v. Schuylkill Haven*, Pa. SEA no. 1611, June 17, 2005.

15. The District requested a meeting to review the results of the reevaluation on August 31, 2005 (S-13).
16. The evaluation report found Student no longer eligible for special education and related services (S-16, p. 14). The Parents disagreed with the results of the evaluation report. The District stated that the regular education curriculum has allowed Student to make meaningful progress. It went on to state that previously cited accommodations were no longer necessary for her to continue successfully in regular education. It also stated Student does not demonstrate the need for specially designed instruction (S-16, p. 14).
17. A multidisciplinary meeting was held on September 23, 2005 (S-14). The District found Student does not need special education (NT 36-37) nor did Student need specially designed instruction. The District issued a notice of recommended educational placement (NOREP) recommending education in the regular education classroom (P-6). The Parents disagreed with the recommendation.
18. The District provided additional documents to the Parents between the first two hearing sessions (P-17). The documents are work samples created by the Student.
19. Examples of the student's work in fourth grade indicate above average performance (S-18, p. 6; S-21, S-22).
20. Dr. T completed a psychoeducational report on Student in December 2005/January 2006 (P-25). She describes signs of depression and anxiety, in addition attention deficit/hyperactivity disorder, dyslexia, and dysgraphia (P-23,

p. 3). Dr. T stated Student does not need to be in special education (NT 445, 521).

III. ISSUE PRESENTED

Is Student eligible for special education and related services?

IV. DISCUSSION AND CONCLUSION OF THE LAW

The District and the Parents participated in a previous due process hearing from October 2004 to February 2005. There were two issues in that hearing: was the Student eligible for special education and related services as a student with a learning disability and was the Student denied a free appropriate public education for the 2003-2004 school year by reason of a deficient IEP and insufficient implementation of the IEP. The hearing officer found the Student was no longer eligible for special education and related services as a student with a learning disability.

The decision of the hearing officer was appealed to the Appeals Panel. The Appeals Panel ordered that the district should complete an educational evaluation within 30 days of the beginning of the year. It also ordered the district to reconvene a meeting of a properly constituted IEP team to prepare a new IEP consistent with conditions specified in their order and with Commonwealth law.

The order of the appeals panel was appealed to federal court. Specifically, the Parents appealed the lack of an award of compensatory education by the appeals panel.

The present due process hearing was requested because the District completed an evaluation of Student finding Student no longer eligible for special education and related services as a student with a disability. The District completed the evaluation after being Ordered by the Appeals Panel to complete a reevaluation. The evaluation completed by the District found Student no longer eligible for special education and related services. The Parents disagreed with the evaluation report, therefore, the District requested the present due process hearing to determine whether Student was eligible for special education and related services.

Student's Educational Placement

Before there is a discussion regarding Student's educational placement, a review of the necessary components of the law is appropriate

The definition for a learning disability is:

§300.8 Child with a disability.

(a) General. (1) Child with a disability means a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with §300.38(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

(b) Children aged three through nine experiencing developmental delays. Child with a disability for children aged three through nine (or any subset of that age range, including ages three through five), may, at the discretion of the State and the LEA and in accordance with §300.111(b), include a child--

(1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(2) Who, by reason thereof, needs special education and related services.

(10) Specific learning disability. (i) General. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical

calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

§300.307 Specific learning disabilities.

(a) General. A State must adopt, consistent with §300.309, criteria for determining whether a child has a specific learning disability as defined in §300.8. In addition, the criteria adopted by the State--

(1) May prohibit the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability as defined in §300.8;

(2) May not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability as defined in §300.8;

(3) Must permit the use of a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures described in §300.304; and

4) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability as defined in §300.8.

(b) Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§300.308 Group members.

The determination of whether a child suspected of having a specific learning disability is a child with a disability, as defined in §300.8, is made by the child's parents and the group described under §300.306(a)(1)

that--

(a) Is collectively qualified to--

(1) Conduct, as appropriate, individual diagnostic assessments in the areas of speech and language, academic achievement, intellectual development, and social-emotional development;

(2) Interpret assessment and intervention data, and apply critical analysis to those data;

(3) Develop appropriate educational and transitional recommendations based on the assessment data; and

(4) Deliver, and monitor specifically designed instruction and services to meet the needs of a child with a specific learning disability; and

(b) Includes--(1) A special education teacher;

(2)(i) The child's general education teacher; or

(ii) If the child does not have a general education teacher, a general education teacher qualified to teach a child of the child's age; and

(c) Other professionals, if appropriate, such as a school psychologist, reading teacher, or educational therapist.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§300.309 Determining the existence of a specific learning disability.

(a) The group described in §300.308 may determine that a child has a specific learning disability if--

(1) The child does not achieve commensurate with the child's age in one or more of the following areas, when provided with learning experiences appropriate for the child's age:

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

(2)(i) The child fails to achieve a rate of learning to make sufficient progress to meet State-approved results in one or more of the areas identified in paragraph

(a)(1) of this section when assessed with a response to scientific, research-based intervention process; or

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, or a pattern of strengths and weaknesses in performance, achievement, or both, relative to intellectual development, that is determined by the team to be relevant to the identification of a specific learning disability, using appropriate assessments consistent with §§300.304 and 300.305; and

(3) The group determines that its findings under paragraph (a)(1) and (2) of this section are not primarily the result of--

- (i) A visual, hearing, or motor disability;
- (ii) Mental retardation;
- (iii) Emotional disturbance;
- (iv) Cultural factors; or
- (v) Environmental or economic disadvantage.

(b) For a child suspected of having a specific learning disability, the group must consider, as part of the evaluation described in §§300.304 through 300.306, data that demonstrates that--

(1) Prior to, or as a part of the referral process, the child was provided appropriate high-quality, research-based instruction in regular education settings, consistent with section 1111(b)(8)(D) and (E) of the ESEA, including that the instruction was delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, was provided to the child's parents.

(c) If the child has not made adequate progress after an appropriate period of time, during which the conditions in paragraphs (b)(1) and (2) of this section have been implemented, a referral for an evaluation to determine if the child needs special education and related services must be made.

(d) Once the child is referred for an evaluation to determine if the child needs special education and related services, the timelines described in §§300.301 and 300.303 must be adhered to, unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in §300.308.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§300.310 Observation.

(a) At least one member of the group described in §300.308, other than the child's current teacher, who is trained in observation, shall observe the child, and the learning environment, including the regular classroom setting, to document academic performance and behavior in the areas of difficulty.

(b) In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§300.311 Written report.

(a) For a child suspected of having a specific learning disability, the evaluation report and the documentation of the determination of eligibility, as required by §300.306(a)(2), must include a statement of--

- (1) Whether the child has a specific learning disability;
- (2) The basis for making the determination, including an assurance that the determination has been made in accordance with §300.306(c)(1);
- (3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;
- (4) The educationally relevant medical findings, if any;
- (5) Whether the child does not achieve commensurate with the child's age;
- (6) Whether there are strengths and weaknesses in performance or achievement or both, or there are strengths and weaknesses in performance or achievement, or both, relative to intellectual development in one or more of the areas described in §300.309(a) that require special education and related services; and
- (7) The instructional strategies used and the student-centered data collected if a response to scientific, research-based intervention process, as described in §300.309 was implemented.

(b) Each group member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the group member must submit a separate statement presenting his or her conclusions.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

This case is unique in that Student was identified as eligible for special education and related services, but after an evaluation is no longer eligible. This case is also unique because of the previous due process hearing. The Appeals Panel decision was also in part appealed to Federal Court. The District completed an evaluation of Student as they were directed to do and that is the focus of the present due process hearing.

The building principal/director of special education for the District testified Student did not need special education because Student is a straight A student (NT 37, 38). He did acknowledge the evaluation report (S-16) that found a significant discrepancy between Student's ability and Student's achievement (S-16, p. 15) in spelling, writing fluency, passage comprehension, and reading vocabulary subtests. For the clusters, reading comprehension, written expression and broad written language fell at a level significantly discrepant from Student's ability (NT 55).

He went in to state Student still has a learning disability but does not need specially designed instruction. Student does well through accommodations and compensation (NT 73). The current specially designed instruction Student receives includes:

review and repetition, positive reinforcement, allow oral reading for comprehension instead of silent reading as needed, encourage Student to recheck written work and/or redo, and remedial reading (NT 74).

The psychologist for the District who completed the initial and subsequent evaluations (NT 77) of Student testified he selected an ability and achievement testing to comply with the Appeals Panel order (NT 78). He also said Student is not eligible

for special education on the whole (NT 91). Student's original problems were with the reading comprehension subtest (NT 96). He is concerned about the problems Student may present in the future with Student's disability (NT 95). He decided Student did not need SDI or accommodations, based on Student's strong current functioning (NT 119).

Below are the results of testing completed by the District (S-16):

Ability testing

Fluid reasoning 118

Knowledge 108

Quantitative Reasoning 105

Visual Spatial Reasoning 117

Working memory 109

Nonverbal IQ 114, Verbal IQ of 111, and Full Scale of 113 (S-16, p. 6).

Based on Grade Expectations	SS	PR
Letter word identification	104	61
Reading fluency	106	66
Spelling	104	61
Writing fluency	100	50
Passage Comprehension	101	53
Writing Samples	106	66
Word Attack	107	68

Reading Vocabulary	96	39
Broad Reading	105	63
Broad Written Language	104	60
Basic Reading Skills	106	66
Reading Comprehension	98	45
Written Expression	102	56
Based on Age Expectations	SS	PR
Letter word identification	100	51
Reading fluency	102	56
Spelling	97	41
Writing fluency	96	39
Passage Comprehension	98	45
Writing Samples	104	60
Word Attack	104	60
Reading Vocabulary	94	34
	SS	PR
Broad Reading	100	51
Broad Written Language	97	43
Basic Reading Skills	102	56
Reading Comprehension	95	38

Written Expression 98 46

Student's teacher describes Student as outgoing and social (NT 127). Reading in the fourth grade is taught as a whole class instruction heterogeneously grouped (NT 127), and Student performs above average (NT 127), and fluently (NT 128). Student's teacher has not noted any specific needs in reading (NT 128). Student's teacher also noted that given that Student is at the top of Student's class Student does not need any specially designed instruction (NT 131).

The instructional support teacher also recommended that Student does not need specially designed instruction because Student is reading at the level of the classroom (NT 154-155).

Student's special education teacher has worked with Student for two years (NT 177-178). She meets with Student twice a week, one on one (NT 178). She described Student as very good in comprehension (NT 178-179). She has not noticed a problem with fluency, and the teachers have not noted any concerns regarding Student's reading (NT 179-181). She does not think Student needs specially designed instruction (NT 182). She thinks SDI is above and beyond the regular class, and she thinks Student does not need this SDI (NT 183). She thinks Student needs no extra help despite the fact Student has a disability but does not require any extra help at this time (NT 184-185). Finally, after working with Student over the past two years she feels Student is making meaningful educational progress (NT 197).

The reading specialist who works with Student twice a week (NT 202) administered the QRI-3 and found Student is at an independent level (NT 204-205).

She does not think Student is eligible for special education, because Student's learning disability does not impede or impact Student adversely in Student's education (NT 214). Finally, she thinks her level of reading is appropriate (NT 210-211).

The only person who really described needs in school was [a family member of Student who] has a BA in nursing, and has certifications as a case manager and a certified disability management specialist. Her area of expertise is not educational matters relating to reading. She described Student's problems with left and right (NT 288), and that Student still cannot tell time (NT 287).

She also described problems Student has in learning to play [a musical instrument.] (NT 288-289). She has no education training and has not completed an observation of Student in schools (NT 343), and does not know how to determine fluency (NT 346). Though a helpful advocate to the family, her lack of knowledge regarding special education issues in the schools, not observing Student in a classroom, and her lack of knowledge regarding reading programs in the schools diminished her credibility.

Parents testified they feel tricked by the District's use of the Appeals Panel decision where it sought to determine eligibility and that the district sought to disqualify Student from special education services (NT 365). They do say, however, that Student has been successful in the regular education classroom (NT 375).

The Parents expert witness, Dr. T, testified that Student has no need for specialized instruction and no need for school based programs to improve Student's

instruction. Student does not need to be pulled out, and that Student is not eligible for special education (NT 445, 521).

As noted above, eligibility for special education and related services is contingent upon meeting a two-part test. A child needs to have a disability and needs to require specially designed instruction. There was testimony as a part of this case that Student has a disability. Specifically, Student has a discrepancy between Student's ability and Student's achievement as documented by the District. There is no evidence, however, that Student requires specially designed instruction. None of the teachers who work with Student indicates a need for specially designed instruction, and the Parents expert witness, Dr. T clarified that Student does not need special education. She stated Student needs the Orton-Gillingham reading approach outside of the classroom, but that no special education is required.

The fact that Student is not eligible for special education and related services is not new. The Decision of the Hearing Officer in the previous due process hearing also found that Student was not eligible for special education and related services. That determination, in addition to the recent evaluation completed by the District, the extensive testimony of those who work closely with Student indicating no need for specially designed instruction clearly indicate to this Hearing Officer that Student is not eligible for special education.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Student is no longer eligible for special education and related services.

Date

Hearing Officer