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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: S. B.
ODR #6444/05-06 AS

Date of Birth: xx/xx/xx

Date of Hearing: May 22, 2006

CLOSED HEARING

Parties to the Hearing:

Parent

Representative:

Pro Se

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

Mimi Rose, Esquire
Office of General Counsel
School District of Philadelphia
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Date Transcript Received:

May 28, 2006

Date of Decision:

June 4, 2006

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is an eligible student enrolled in the School District of Philadelphia (hereinafter District). His mother asked for this hearing because she believes that Student's IEP is not being implemented and that he therefore is not being offered a free appropriate public education (FAPE). The District's position is that Student is being offered FAPE, but that he is not taking advantage of what the District has offered.

Student was the subject of a previous due process hearing (#5999/05-06 KE) that resulted in this hearing officer's December 2005 ruling that she lacked jurisdiction over the issue, a parental request for a change in schools. However, some information from that hearing is offered as background to aid in understanding the student.¹

Behavioral problems were present from preschool and, subsequent to inpatient hospitalization in February 1999 for physical aggression and other dangerous behavior at home, Student attended a partial hospitalization day treatment program. At that time a psychiatric evaluation noted frequent school absences, difficulty getting along with teachers, peers and adults, and an inability to focus on schoolwork.

In June 2003 (end of 6th grade) an evaluation found him to be functioning in the average to low average range (VIQ 97, PIQ 83, FSIQ 90), his teacher reported he was instructional at a 6th grade level in reading and at the middle of 5th grade in math, and his WIAT standard scores were Basic Reading 91, Reading Comprehension 95, Mathematics Reasoning 73, and Spelling 96. He was not disruptive in the classroom. He continued to be found to have a disability (emotional disturbance with other health impaired as a secondary category) but not to be in need of specially designed instruction, and with his mother's approval was exited from special education. In May 2003 Student received an occupational therapy evaluation, and although some difficulties were noted, particularly in handwriting, occupational therapy was not found to be necessary.

In December 2003 Student received another evaluation. On the Stanford Binet he achieved a Standard Age Score (SAS) of 88 in verbal reasoning, an SAS of 82 in visual abstract reasoning, an SAS of 74 in quantitative reasoning, and an SAS of 78 in short term memory. Achievement testing with the WIAT yielded standard scores as follows: Basic Reading 77, Reading Comprehension 94, Mathematics Reasoning 85, Numerical Operations 83, Spelling 96 and Listening Comprehension 95.² He was again found to be eligible for special education under the classifications of emotional disturbance and other health impairment (ADHD).

¹ The information is based upon the IEP dated May 3, 2005, an occupational therapy evaluation dated May 1, 2003, an ER dated June 17, 2003 and a psychological evaluation report dated December 3, 2003 and is taken from the previous Due Process Hearing Decision.

² The evaluator believed the scores may have been depressed because of lack of motivation and his not having received his medication for ADHD the morning of the testing.

Issue

Has the School District failed to offer Student a free appropriate public education (FAPE) by failing to follow the Behavior Support Plan, failing to implement the specially designed instruction in the IEP, failing to supply the Parent with reports of her son's progress and failing to accommodate his difficulties with handwriting.

Findings of Fact

1. Student is a [teenaged] eligible student who currently attends High School.
2. As of the 3rd quarter Student had been absent a total of 37 days for the year, most of these days having been accrued in the 1st quarter (24) and the 2nd quarter (10), with only 3 absences in the 3rd quarter itself.³ Most of the absences during the first two quarters were due to a change in schools and other factors. (P-2, P-8, P-10)
3. However, Student's instances of being late have increased from 5 in the 1st quarter, to 27 more the second quarter, to 36 additional for the 3rd quarter, for a total of 63 occasions of lateness by the end of the 3rd quarter.⁴ (P-2, P-10)
4. Student is capable of grade level work as demonstrated by his grades on select tests and quizzes. (P-6)
5. Student received the following grades on his last (3rd quarter) report card: English F, Resource Reading F, World History D, Algebra I D, Intensive Math F, Physical Science F. (P-2)
6. A daily log of Student's activities in Algebra I (4th period) includes poor performance in the areas of completing classwork, class participation and homework completion, as well as poor grades on tests and quizzes. On a number of occasions Student cut class or was off-task during class. On several occasions he engaged in throwing (food, paper and a textbook) and in "play fighting". (P-3)
7. Although a "Functional Behavior Assessment for Behavior Support Plan" was done on 12-16-05 and 12-19-05 it did not identify antecedents, did not explore environmental conditions, did not list expected behavior changes, methods/criteria for determining outcome, or frequency of review. It did not note who was responsible for implementing the "plan" or who was to supervise the "plan". (P-4)

³ Some of these absences are in dispute and may have been suspension(s).

⁴ Student was referred to Truancy Court. Although found not to be truant, on May 4, 2006 it was ordered that he attend school daily, with no lateness, cutting or suspensions, and that absences may only be excused with a physician's note.

8. At a Resolution Meeting (pre-hearing conference) on February 3, 2006 the parties agreed that Student would be given a daily agenda planner to take to his teachers for input and assignments and to use as a vehicle for communication with the Parent. Student has lost two daily agenda planners and has resisted carrying the planner and giving it to the teachers to sign. (NT 119; S-1, P-5)
9. Student's teachers were to complete Interim Progress Reports for Student to take home to his Parent. These were done for about two weeks and then stopped. (P-1)
10. The Interim Progress Report forms prepared for Student are identical to those for another student with the same first name as Student. This is a matter of record because Student's mother was erroneously sent the other student's report and introduced it into evidence. (P-1)
11. Various elements of Student's IEP are not being followed, or are not sufficiently structured. (P-11, P-12)
12. Work in the resource room is not perceived by Student to be at grade level. (NT 110-111)
13. Guidance counseling sessions have devolved into mere check-ins rather than having substantive content. (NT 114-115; S-6)
14. Student is not getting enough homework to reinforce what he is learning at school. (NT 119, 126-127)
15. Student is not sufficiently assisted to record his homework assignments. (NT 120)
16. Student is not being given simplified directions by all his teachers. (NT 120-121)
17. Student's tests are not being administered in a small group setting. (NT 121)
18. Student's difficulty printing/writing, which is interfering with his test-taking, is not being given sufficient remedial accommodation. (NT 130-132)
19. Student is not being given extended time for quizzes. (NT 122)
20. Student is not receiving assistance in recording material that is written on the board. (NT 122-123, 127-130)
21. Daily reports were not done consistently and stopped being done after a few weeks. (NT 124-125)

22. The Parent was given a Permission to Evaluate form in February so that the District could complete an occupational therapy evaluation to address reported handwriting issues. The Parent did not return the form until April. (NT 90-92)

Discussion and Conclusions of Law

Legal Basis

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Improvement Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (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 Individualized Educational Program (IEP).

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

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

Discussion

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress,

although the implementation of an appropriate IEP does not guarantee that the student will make progress. In this hearing there was no dispute as to the appropriateness of Student's IEP. The dispute centered upon whether or not the IEP is being implemented.

Although the relationship between the Parent and the District is clearly strained and the Parent has not always acted appropriately or in a manner that would promote Student's best interest, a review of the evidence leads this hearing officer to agree that her son's IEP is not being appropriately implemented. This hearing officer found Student's testimony to be credible, and given that the District did not present testimony directly from each of his current teachers and the guidance counselor his testimony stands unrefuted. The District's main argument in defense of its position is that Student was resistant to following the provisions of his IEP. Although this was clearly the case in some instances, resistance to the implementation of an IEP is not uncommon for students with emotional disturbance and must be factored into a district's approach to providing FAPE. Furthermore, from the math teacher's testimony and from Student's statements about this individual, it seems that Student can respond to a teacher who is willing to carry out his role in a responsible and kind manner.

In addition to the concerns raised by the Parent, this hearing officer also finds that 1) the December 2005 Functional Behavior Assessment/Behavior Support Plan for Student is poorly done and is not appropriate; and, 2) the District in this instance was dilatory and careless, given that the form for interim reporting on Student's functioning is identical to that of another student and, in violation of FERPA, the other student's report was given to Student's Parent. Despite coming to some good faith agreements at a Resolution Meeting with the Parent about assignments and reporting, the District has not found a way to honor the agreements in the context of Student's being a student with disabilities in the areas of emotional disturbance and other health impairment (ADHD).

The District shall be ordered to procure an independent functional behavior analysis and ongoing behavioral consultation, and will be ordered to implement Student's IEP according to both the letter and the spirit of the law, putting safeguards into place to assure that the Parent receives reports of Student's progress as well as of any failure on his part to comply with the plan in place. By way of dicta, given the strained relationship between the Parent and the school, it would be useful if Student's intensive case manager would become a regular member of the IEP team to assist the Parent in the process of working together with the District in Student's interests. Given that both Student and the Parent respect the math teacher who provided testimony for the District, the District would do well to invite him to be a member of the IEP team as well.

ORDER

It is hereby ORDERED that:

1. The School District shall engage the services of a trained and certified behavior specialist consultant:
 - a) to perform a formal Functional Behavioral Assessment, and
 - b) to develop a structured positive Behavior Management Plan, and
 - c) to develop reporting forms that the teachers must use daily to track behaviors.

The behavior management plan should address, but not be limited to, attendance, elimination of cutting classes, homework completion, assignment completion, appropriate behavior in the school setting, and participation in the twice-weekly sessions with the guidance counselor.

The behavior specialist consultant shall be from the educational field, rather than from the mental health field.

The FBA must be completed and the BMP completed and in place within 45 school days of the date the District receives this decision.

2. A list of all the specially designed instruction and accommodations contained on the IEP must appear on the reverse side of the reporting forms that the behavior specialist will devise. Each day the teachers are to check which of these strategies was employed with Student.
3. The reporting forms are to be completed by each of Student's teachers every day and shall be mailed home through the guidance office or the IEP custodian once a week. Student is not to be given the task of carrying these forms on his person and presenting them to the teachers, and he is not to be given the task of taking them home to his parent.
4. The specially designed instruction/accommodations for Student must include but not be limited to:
 - a) a clearly printed or typed copy of all notes his teachers post on the board, to be given to Student at the beginning of each period;
 - b) extended time for all tests and all quizzes;
 - c) all tests (not all quizzes) to be administered in a small group setting such as a learning support resource room;
 - d) the opportunity for Student to meet individually with each teacher or his/her designee immediately after any test that requires a written response longer than one sentence so that he may supplement his written response orally. His

oral responses must be written on the test sheet(s) by the person conducting the oral examination;

- e) a clearly printed or typed copy of all homework assignments for the week to be given to Student on the first day of every week, including a specific notation “no homework assigned” when there is no homework, with an email containing same being sent to the Parent weekly;
 - f) the requirement that the Parent sign all completed written homework for each subject each night;
 - g) preparation of grade-level math and literacy worksheets by Student’s math and English teachers, or selection of same from published materials, to be supplied to the resource room teacher to give to Student on days when he does not have any specific class assignments to complete.
5. Student must have an appointment with the guidance counselor twice weekly. These appointments must last for an entire period and, if there are no immediate behavioral or personal concerns, the sessions should include structured social skills training, exploration of interest and aptitudes, guidance regarding college selection, guidance regarding preparation for college entrance exams and college essay writing.
6. Student must be in compliance with the Truancy Court Order of May 4, 2006. The District must follow up any lack of compliance (lateness, cutting, absence) without delay, by informing the Parent through telephone call or email. Any pattern of lack of compliance should trigger a re-referral to Truancy Court.

June 4, 2006

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer