

This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Student

Name of Student

Xx/xx/xx

Date of Birth

6489/05-06 LS

ODR File Number

June 12, 2006

Date of Hearing

June 30, 2006

File Closed

Closed Hearing

Parties to Hearing

Parent

Mr. and Mrs. Parent

Date Transcript Received:

June 19, 2006

Parent Representative

Sarah Davis, Esq.

McAndrews Law Offices

30 Cassat Avenue

Berwyn, PA 19312

Date of Decision:

July 5, 2006

School District

Linda Berandier

Schuylkill Haven Middle School

120 Haven Street

Schuylkill Haven, PA 17927

District Representative

Gina DePietro, Esq.

Sweet Stevens Tucker & Katz

331 Butler Avenue

PO Box 5069

New Britain, PA 18901

Kenneth Rose

Hearing Officer

Background

The student is a [teenaged] student who just completed seventh grade in the school district's middle school. He attended school district schools until the end of grade four. In the summer of 2003 he was committed by court order to the [redacted] Program, a day treatment mental health facility. The reason for the placement was dangerous behaviors at home. He remained at [redacted] for fifth and sixth grades at which time he returned to the school district. He is an eligible student in need of emotional support (ES).

Stipulations

1. The student's date of birth is xx/xx/xx.
2. The student is a resident of the Schuylkill Haven School District.
3. The student is an eligible student with an emotional disturbance (ED).

Findings of Fact

1. In August 2003 the school district was informed the student was placed in the [redacted] Program, a day treatment mental health program. This was by court order due to severe dangerous behavior, family issues and educational problems.

The [redacted] Intermediate Unit (IU) provided educational services to the student.

The [redacted] Program used the academic curricula and texts of the student's school(s). The academic part of the program was paid by the student's school district. (NT 29, 32, 98, 191, 192; S-6, S-9, S-29)

2. While at [redacted], behavioral issues were dealt with as part of mental health treatment. (NT 42-44)

3. On June 14, 2004 a psychiatric report by Dr. C was issued. It indicated three admissions to [redacted] Partial Hospitalization Program. The student had a history of aggression to peers [self and family members]. At that time the student was medicated with Abilify (5 mg.) and Strattera (40 mg.). His diagnosis was Axis I: Oppositional Defiant Disorder (ODD); Attention Deficit Hyperactivity Disorder (ADHD) and Depressive Disorder NOS; Axis II: No diagnosis; Axis III: Parent was strongly suggested to undergo neurological evaluation to rule out other seizure disorders; Axis IV: Psychosocial Stressors; Different parental skills and support; Axis V: GAF-40-50. (S-8)

4. On May 5, 2004 the school district requested permission to evaluate the student. The request came from the [redacted] Program staff. Tests and procedures were to include cognitive, achievement, psychiatric testing and social/emotional assessment.

On October 19, 2004 the school district received permission from the mother to evaluate the student. Tests and procedures to be done were “psychological and psychiatric testing.” (S-7, S-11, S-12, S-14)

5. The school psychologist who conducted the January 26, 2005 evaluation did not review all of the student’s school records. Some background information in the evaluation report (ER) is not accurate. The ER of January 26, 2005 relies on Dr. C’s psychiatric evaluation.

The evaluator discussed the student with teachers and therapists from Possibilities for his ER of January 26, 2005. (NT 148-150, 163, 179, 180; S-8, S-14)

6. A multidisciplinary team (MDT) meeting was held January 26, 2005 to review the ER. The parent did not attend but the psychologist talked with her by telephone and included her input in the ER.

The student’s cognitive abilities were found to be low average. His perceptual reasoning was found to be average. Processing speed was found to be average. Academic achievement scores were below average in Broad Reading, math fluency and Broad Written Language. The ER of January 26, 2005 does not recommend to the individualized education program (IEP) team strategies for programming for weak areas of cognitive abilities.

The evaluator used Dr. C’s evaluation of June 14, 2004 for social emotional information. A report from the student’s classroom teacher was used. His behaviors have improved, but he was anxious about returning to regular school. The evaluator says the student needs a good deal of support, a small group setting and structure. It was suggested that he be phased into his new school setting. He was identified as a student with emotional disturbance.

The ER of January 26, 2005 states the student’s emotional status and behavior is the primary impediment to his academic progress. (NT 159, 163, 174, 175, 178, 184; S-14)

7. An appointment for a psychiatric evaluation was made for December 10, 2004. The parent did not keep the appointment. (NT 194; S-12)

8. The school district did not hold an IEP meeting following the January 26, 2005 ER until May 10, 2005 (69 school days). The school district had personnel problems and did not “stay on top of those types of compliance issues.” (NT 196)

9. An IEP meeting was held May 10, 2005. His math level was stated as 6.2 and his instructional reading level as 6.5 or 5.5. Present levels in May 10, 2005 IEP were reported to the author of the IEP by the classroom teacher at Possibilities. There were no reading or math goals on the IEP.

A goal for understanding of required behavior and classroom participation was stated. It was supported by two short term objectives. The level of achievement was set at 4/5 observed trials in six week period. Six specially designed instructions (SDIs) were listed, including a Behavior Intervention Plan (BIP). He was placed in an itinerant emotional support (ES) class at Possibilities.

The IEP team focused on only behaviors because it felt behaviors were the hindrance to academic progress. (NT 33, 34, 35, 90; S-15)

10. Prior to the May 10, 2005 IEP, the student was receiving regular education services at [redacted]. (NT 32)

11. The IU itinerant support teacher was only involved with the student from May 11, 2005 to the end of the school year.

The IU's itinerant support teacher at [redacted] saw the student 30 minutes per week. This time included collaboration and consultation with staff. (NT 38, 89, 91)

The IU itinerant support teacher opines that the student's behavior impeded his learning. (NT 36, 38, 89, 91)

12. The BIP in the May 10, 2005 IEP lists targeted behaviors, alternative behaviors, strategies and outcomes. (NT 47, 48, 52; S-15, S-20)

13. By way of a Notice of Recommended Educational Placement (NOREP) the parent approved the program and placement of the student on May 10, 2005. (S-15)

14. Progress on the IEP goal was not measured or reported on the May 10, 2005 IEP. (NT 38; S-15)

15. The student's grades at [redacted] Program for 2003-2004 school year were English-C+, Math-B, Science-C, Social Studies-C+. For the 2004-2005 school year they were English-B, Reading-B, Math-B and Social Studies-B. (S-17)

16. On July 26, 2005 a reevaluation report (RR) was issued. The RR was based on existing data. No new testing was done to update data or educational levels. The parent did not return the input form.

The reading and math levels in the July 26, 2005 RR were taken from the IEP of May 10, 2005.

The RR of July 26, 2005 called for more intensive levels of ES for the student when he transitioned to the middle school. (NT 169, 170, 183, 185; S-15, S-19)

17. No MDT meeting was held to review the RR of July 26, 2005. (NT 183;

S-19)

18. The IEP meeting scheduled for July 28, 2005 was rescheduled to August 12, 2005 at parent's request. The parent didn't attend the rescheduled meeting. (NT 70)

19. On August 12, 2005 an IEP was developed for the student. The IEP team consisted of a special education teacher, LEA, mental health representative and special education supervisor. No regular education teacher was present. The parent was not present. A note on the IEP states the parent was notified by phone that the IEP meeting would be held and a copy sent to her.

Present levels for reading were stated as 6.5 and math 6.2. Academic achievement was stated in terms of previous grades. His need for small group instruction and monitoring of behavior to encourage coping skills were listed.

The annual goal, short term objectives, SDIs and BIP are the same as the May 10, 2005 IEP. The student placement was part time ES.

The reading and math levels on the August 12 IEP were carried over from the May 10, 2005 IEP. No related services are listed for the student on the August 12, 2005 IEP. (NT 72, 78; S-20)

20. The August 12, 2005 IEP was viewed as a "bridge" IEP to bring the student back to the school district. (NT 93, 94)

21. A NOREP was issued for the August 12, 2005 IEP and placement. It was not returned by the parent. (NT 68, 69, 199; S-20)

22. The goals on the May 10, 2005 and August 12, 2005 IEPs are the same. (S-15, S-20)

23. The IU itinerant support teacher who prepared the August 12, 2005 IEP had not been trained on the new IDEIA 2004 IEP requirements. (NT 76, 77)

24. The BIPs of May 10, 2005 and August 12, 2005 were based on a review of records and information gathered from the staff at Possibilities. The BIPs of the May 10, 2005 and August 12, 2005 IEPs are not drawn up in measurable terms. The behavior goal and objectives in the May 10, 2005 and August 12, 2005 IEPs do not have baseline data; neither do the BIPs. (NT 58-63, 102)

25. The short term objectives in May 10, 2005 and August 12, 2005 IEPs have expected levels of achievement. (NT 63)

26. The ES class has about six students with a teacher and two part time aides. (NT 132, 133)

27. The student had no supports in his regular education classes. (NT 146, 147)

28. The student was referred to the Student Assistance Program (SAP) on December 8, 2005 to receive counseling over issues of not having contact with his biological [redacted]. The parent did not respond to the referral. (NT 199, 200; S-21)

29. The current ES teacher does feel the current placement is not always appropriate. (NT 142, 143)

30. The teacher implemented the August 12, 2005 BIP. She kept records of changes of behavior. (NT 133, 134, 135; S-28)

31. The teacher used rewards to improve appropriate behaviors but this was not effective with the student. (NT 141, 144)

32. The student is socially withdrawn. His behavior varies during the day. In regular education classes he doesn't often cause problems. Defiant behaviors increased during the year. (NT 131, 132, 136, 137, 143, 144)

33. On February 17, 2006 an invitation to participate in an IEP meeting was issued to review increasing of time in special education due to behavior issues and not completing tasks. (NT 200, 201; S-22)

34. On February 28, 2006 the student made a "bomb threat." He was suspended under the school district's terroristic threat policy for three days. A Manifestation Determination was conducted on March 7, 2006 and the behavior was found not to be a manifestation of the student's disability. (S-23, S-24, S-26)

35. The August 12, 2005 IEP was implemented until March 7, 2006. (NT 214)

36. An IEP was developed March 7, 2006. The student's instructional reading and math levels were 6.5. Reading fluency was 113 wpm. The IEP has a reading goal with three short term objectives (one being in the area of math skills). There is no separate math goal. There is a behavior goal with three short term objectives. There is a Positive Behavior Intervention Plan (PBIP) that is similar to previous ones. The BIP in the March 7, 2006 IEP was an attempt to update the previous PBIPs.

Goals were listed for behavior and academics. Measurable short term objectives were listed in each area, including ones for reading and math. Six SDIs were listed including a PBIP. The PBIP was attached to the IEP. The BIP was expanded from previous ones.

The reading and math levels on the March 7, 2006 IEP were based on level of the books being used, not any evaluation.

A NOREP was issued, which the parent refused to sign. (NT 107-117, 139, 146, 221, 222; S-15, S-20, S-22, S-25)

37. The parent wanted to consult with her attorney before she signed the NOREP or manifestation determination. The recommended placement was the [redacted] Center, an alternate education placement. At the [redacted] Center he was to be evaluated. The parent rejected this. (NT 202, S-25)

38. On March 14, 2006 the IEP developed on March 7, 2006 was issued. This contained an attachment and placement pages calling for a forty-five day interim placement full time at [redacted] Center. (S-26)

39. As part of the student's return to school after the "bomb threat" incident the student was required to have a psychiatric evaluation to ascertain if the student posed a danger to himself or others if he were to return to school. The expense was to be the parent's unless she agreed to an interim educational placement at the [redacted] Center. (S-26)

40. By way of a letter, the date for the required psychiatric evaluation was extended to March 24, 2006, Also, the parent was invited to a March 20, 2006 Pre-Hearing Conference. (S-26)

41. A psychiatric evaluation was done by Dr. L on March 31, 2006. The diagnosis is: Axis I: Oppositional Defiant Disorder (ODD) and Dysthymic Disorder, early onset; Axis II: Deferred; Axis III: none reported; Axis IV: Psychosocial Stressors (history of abuse, abandonment by father, authority conflicts).

Recommendations are ES and learning support (LS) classes; continue on medications; counseling and, if situation not ameliorated, partial hospitalization.

The parent agreed with the report. (NT 204; S-27)

42. After the psychiatric evaluation of March 31, 2006 and the request for this due process hearing, a crisis plan was developed for the student and a Functional Behavioral Assessment (FBA) has been done. (NT 123, 205)

43. During his seventh grade school year the student exhibited behaviors that were injurious or a safety concern. These were not covered by the PBIP. (NT 125)

44. Progress on IEP goals were not reported or given to the parent during any of the IEPs duration. (NT 146)

Issues

Was the student denied FAPE due to:

1. The district's failure to evaluate the student?
2. The district's production of an inappropriate ER?

3. The school district's issuing of an inappropriate IEP?
4. The district providing an inappropriate placement for the student?

Discussion and Conclusion of Law

The issue of this hearing is a basic determination of whether the student received FAPE. 10 U.S.C. §1402(9)(4) establishes that eligible students must receive a free public education that is appropriate under the law. An appropriate IEP is one that meets the procedural and substantive regulatory requirements and is reasonably calculated to enable the child to receive meaningful educational benefit to the child 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)]. The IEP must afford the child with special needs an education that would confer meaningful benefit. Polk v. Central Susquehanna IU #16, 853 F. 2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989), citing Diamond, held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational progress is likely.”

The school district was aware by August 2003 that the student was placed in [redacted] (FF1). The placement was by court order due to severe dangerous behavior, family issues and educational problems. 20 U.S.C. §1412(a)(3)(A) requires a school district to identify students in need of special education. It was not until May 5, 2004 that the school district sought permission to evaluate the student (FF 4). The school district did not pursue this and it was not until October 19, 2004 that the parent gave permission. The school district did not use its legal remedy to require the initial evaluation of the student, [20 U.S.C. §1414 (a)(1)(D)(ii)(I)]. This delay is a failure of child find.

The evaluation was completed on January 26, 2006. The evaluation meets the requirements of 20 U.S.C. §1414(a)(1)(A) and §1414(b)(2), but while it is complete, it ignores academic weaknesses in Broad Reading, math fluency and Broad Written Language noted in the ER (FF 6). This is significant enough to make the ER inappropriate. This deficiency led to IEPs being created that ignored academic needs. The ER of January 26, 2006 states the student's emotional status and behavior impedes his academic progress (FF 6).

For an inexplicable reason no IEP meeting was held until May 10, 2005, sixty-nine days after the issuing of the ER. This is a clear violation of 34 C.F.R. §300.343(b) and impacted the student's receiving needed special education services.

20 U.S.C. §1414(d)(1)(A) defines an IEP as:

- (d) Individualized Education Programs –**
(1) Definitions – In this title:

(A) Individualized Education Program –

(1) In General – The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –

(1) a statement of the child’s present levels of academic achievement and functional performance, including –

(aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to –

(aa) 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

(bb) meet each of the child’s other educational needs that result from the child’s disability;

(III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress of the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child –

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extra-curricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph.

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16)(A); and

(bb) If the IEP team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why –

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and....

The IEP developed May 10, 2005 contains present educational levels of reading 6.5 or 5.5 and math 6.2. Note that the reading level stated may be 5.5 since it is difficult to read. There is no indication of the basis for these numbers making measuring progress impossible. There is a goal and short term objective for the student's behavior and accommodation under the SDIs (FF 9). An SDI lists a BIP which is in the IEP. It can be argued that the BIP is weak or not best practice, but there is one. There are no academic goals even though the ER shows the weaknesses listed above in the ER. The IEP was for the itinerant ES placement at Possibilities. The parent approved the IEP by way of a NOREP (FF 13).

No progress reports were given to the parent (FF 44). This is a serious violation of IDEIA in that it hinders the parent and subsequent IEP team in measuring progress and improving programming.

On July 26, 2005 a RR was issued. The report was based on existing data and contained the same fatal flaw of not recognizing measured academic needs (FF 16).

On August 12, 2005 an IEP was developed for the student to enter seventh grade in the school district. The same non measurable levels of performance were used as the previous IEP and the IEP was substantially the same as the May 10, 2005 IEP (FF 19 and 22). The BIP remained the same (FF 24). The student was placed in a part time ES class. The parent did not attend the IEP meeting or approve or disapprove the program and placement (FF 19 and 21).

There was a serious behavioral incident February 28, 2006 that led to a suspension (FF 34).

An IEP was developed March 7, 2006. Reading and math levels listed under present levels were based on the tests being used for instruction not measurable levels (FF 36). An academic goal was listed to cover reading and math (FF 36). The weakness in reading fluency was not addressed. A behavioral goal with short term objectives was listed (FF 36). The BIP was updated (FF 36). This IEP is significantly flawed in the areas of present levels of performance and academic goals. The parent rejected the NOREP. (FF 36)

The progress on all three IEPs listed above was never reported or given to the parent (FF 44). This oversight is a significant breach of FAPE since it hinders the school and parent in measuring and improving programming.

By a preponderance of the evidence, I find that FAPE has been denied to the student from the time he was placed in [redacted] to the present.

The remedy for failure to provide FAPE is compensatory education. Guidance in this is M.C. v. Central Regional School District, 817 3d 389 (3d Cir., 1996) and Neshaminy School District, 37 IDELR §116 (SEA PA 2002).

The legal standard for compensatory education is set forth in *M.C. v. Central Regional School District*. Compensatory education is an appropriate remedy for a school district's failure to act when it knows (or should know) that a student's educational program is not appropriate or that the student is receiving only trivial educational benefit. The period of compensatory education is equal to the period of deprivation, excluding the time reasonably required for the district to act accordingly.

In calculating the compensatory education, I will limit the award under 20 U.S.C. §1415(b)(6)(B) and §1415(f)(3)(c) to the two years prior to filing for the due process or April 12, 2004.

The first time period for calculation is the period of time from April 12, 2004 to October 19, 2004 when the Permission to Evaluate was issued and signed. This amounts to sixty-eight school days. In balancing the equities, it must be recognized that the student was in a mental health program that committed a part of the day to mental health treatment. I will use a number of two hours a day for educational programming. This amounts to 136 hours.

I must allow the school district the sixty school days it is entitled to conduct its evaluation. This takes us to January 26, 2005. The school district then had thirty days to develop an IEP. This takes us to February 27, 2005. For the next thirty-eight days the school district was out of compliance for failure to develop the IEP. This is thirty-eight days at two hours a day or 76 hours of compensatory education.

From May 10, 2005 to the end of the school year, there were fourteen days of an inappropriate IEP. Using the same calculation this is twenty-eight hours plus three ES itinerant support sessions at thirty minutes each. This totals 29.5 hours of compensatory education.

The inappropriateness of the IEPs of August 12, 2005 and March 7, 2006 are significant enough to make the entire IEP inappropriate. The student is entitled to the number of hours in a school day from August 29, 2005 until an appropriate IEP is developed.

A troubling pattern in the record of this hearing is the parent's failure to keep evaluation appointments and meetings with MDT and IEP teams. I urge the parent to be more directly involved in planning meetings.

Although BIPs and FBAs are not required under IDEIA 2004, I hope the school district continues to develop one for the student using best practices.

The LEA is ordered to take the following action

1. Immediately develop an appropriate IEP for the student.

2. Provide compensatory education in the amount of 241.5 hours plus the number of school hours the school is in session from August 29, 2005 until an appropriate IEP is developed.

3. The use of the compensatory education time will be decided by the IEP team with the parent having final approval. The compensatory education must be used to meet stated IEP goals and objectives. The compensatory education will be delivered outside of the regular school day and ESY. The time period for utilizing the compensatory education will extend until the student's twenty-first birthday.

Date

Kenneth Rose
Hearing Officer