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S.K.

Child's Name

xx/xx/xx

Date of Birth

6643/05-06 LS and 6595/05-06 LS

ODR File Numbers

July 5, 6, 7, 21 and 24, 2006

Dates of Hearings

July 31, 2006

File Closed

Closed Hearing

Parties to Hearing

Parent

Dates of Transcripts:

July 9, 13, 16, 28, 2006

Parent Representative

Alan Yatvin, Esq.

230 S. Broad Street, Suite 503

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Date of Decision

August 8, 2006

School District

Ruth Furman, Executive Dir. of Special Education

Upper Darby School District

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District Representative

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Hearing Officer

Background

The student is a xx year-old student who is a resident of the school district. In elementary school he received special education services as a learning disabled student. In middle school (grade six) there was a traumatic incident. The parent removed the student from the school district and placed him in [redacted Private] School and filed for a due process hearing.

After a due process hearing the school district and the parent entered into a settlement agreement that placed the student at Private School for grades seven and eight. The agreement established a time line and process for a reevaluation of the student in his eighth grade year. There was provision for evaluation, Individualized Education Program (IEP) development and placement in the agreement.

Currently the student is identified as an eligible student with emotional disturbance (ED) and learning disability (LD).

Stipulation

1. The student's date of birth is xx/xx/xx
2. The date on S-25 should be March 10, 2006.

Findings of Fact

1. In 2001 the student was diagnosed as having a "disorder of written expression" and a "developmental coordination disorder." (NT 157, 158; P-40)

2. In 2003 the student was identified as having a specific learning disorder (NOS) in executive functioning and Dyspraxia. (NT 159; P-53)

3. The school district and the parent entered into a settlement agreement after a previous due process hearing. It provided for the student to attend Private School at district expense for two years. It called for a reevaluation of the student starting in December 2005 and set up a time table for a Reevaluation Report (RR), IEP development and placement recommendation for the 2006-2007 school year. There was a provision for an Independent Educational Evaluation (IEE) at district expense if the parent disagreed with the RR. The provision in the settlement agreement of a thirty day extension of the IEP meeting was only if more time was needed to complete the IEP. (NT 241, 403, 857; S-1)

4. The student takes medication for anxiety, attention deficit/hyperactivity disorder (ADHD) and depression. (NT 113, 170)

PRIVATE SCHOOL

5. Private School is a private school for learning disabled students. It has grades six through twelve. Mentors met with the student five times per week for thirty minutes. All students have a mentor. Class size is five to eight students.

The student had a feedback sheet at Private School to help with behaviors. He was provided extra time to complete assignments. He has gained in coping skills and peer relationships. His emotional gains can be transferred to other environments. He handles new situations well if he is prepared for them. The student gets academic and emotional support. (NT 52, 138, 171, 172, 174, 280, 283, 298, 308, 320, 321, 322, 742, 743; S-9, P-108, P-110)

6. Reports from Private School show good academic progress and improved behavior. The process of writing is a weakness. He resists use of a computer to help with writing assignments.

The school psychologist did not have all this information when she did the March 1, 2006 RR, but it was referenced in the P report contained in the May 12, 2006 report. (NT 116-121; Leren-B; S-11)

7. The student has done well at Private School. He is provided extra time for assignments. He experienced growth in social skills through his counseling at Private School. He handles new situations well if prepared for them. Private School was a safe and comfortable environment for him. (NT 52, 138, 171, 172, 174, 175, 283, 308, 742, 743; P-108, P-110)

8. At Private School students without IEPs have personalized education plans. (NT 313, 314)

9. The assistant headmaster at Private School feels the student needs emotional supports and benefits from the twice a week clinical groups. (NT 317)

10. The student receives some teasing at Private School. (NT 105)

11. The student enjoys attending Private School. (NT 229, 230)

REEVALUATION

12. The school district has written a proposal and won a grant to be a model school for the Response to Intervention Model for identifying learning disabilities. They have gone to trainings on this model. (NT 112-115, 440-445)

13. The school district's school psychologist used the Response to Intervention Model for identifying learning disability. She found no learning disability. The student's difficulties are due to ED and ADHD issues. (NT 15-23, 103)

14. During the evaluation process, the school psychologist first requested, from the parent, permission to talk to Dr. G, the student's private psychologist, and Dr. D, the student's psychiatrist, and then changed it to a request for a written treatment summary. Nothing was received prior to the date the RR was due to be completed. Dr. G's information was in the P report.

After receiving the G report, the school psychologist considered it for the May 12, 2006 RR. (NT 34, 127, 128, 263, 264; S-17)

15. On March 1, 2006 the school district issued an RR. It contained previous information known to the school district, information from the parent, current educational records, achievement tests, teacher input, Private School's Personal Educational Plan, occupational therapy (OT) evaluation results, a behavioral assessment, observations by the Executive Director of Special Education and the school psychologist and conclusions.

The student's achievement was found to be average or above except for math fluency. Academic progress was good. No weaknesses were found in areas of motor skills or hand-eye coordination that would interfere with writing process. He had behaviors that were in the clinical or at risk level in areas of anxiety, withdrawal, depression, aggression and internalizing problems. Executive functioning and written expression problems were found to be part of his ADHD and emotional problems. His academic performance was found to be commensurate with his ability. His disability was identified as ED.

On May 12, 2006 the Evaluation Team met and issued a "Finalized" RR. The RR of March 1, 2006 was changed to indicate no additional data was needed, the P Psycho educational Evaluation was added in total and Specific Learning Disability (LD) was added as a secondary eligibility based on the P report. This was a compromise decision by the school district.

The student's sixth grade history was considered by the school psychologist when she wrote the RR. She reviewed the R report after her March 1, 2006 report and it did not alter her conclusions. (NT 9, 11-14, 22, 25, 53, 54, 58, 59, 60, 61, 62, 85, 86, 101, 102, 134, 137; S-11)

16. The student's written expression deficit is in processing speed. He writes slowly. He needs extra time. He also has organizational issues. He has trouble getting started. This all leads to his fluency problems in math, writing and reading. (NT 217, 218)

17. The school psychologist used general population norms when scoring the Behavior Assessment Scale for Children (BASC). She felt this was better than the ADHD norms because she was trying to understand the student within the normal population. (NT 57; S-11)

18. The school psychologist sees the student as fitting into the cluster of descriptors in IDEIA's 2004 definition of ED. The ED diagnosis is based on the totality of the student's history and Dr. G's report.

She saw no need for a functional behavioral assessment (FBA) because she saw no needs that required one. (NT 14, 15, 41-43, 44-52, 56, 57, 142-146, 181, 182, 183; Leren-1

19. The school psychologist does not think there is a learning disability, but she honors Dr. P's (private evaluator) opinion based on the discrepancy model. She sees the needs as emotionally driven. (NT 38, 39, 87-91)

20. In her March 10, 2006 letter, the parent requested an IEE as allowed in the settlement agreement. (NT 413, 414, 417, 419; S-19, S-20, S-21, S-25)

21. The parent discussed her concerns at the May 12, 2006 RR meeting. The parent raised her concern about the student being identified as ED. (NT 646-648, 649-661, 662, 668)

22. Dr. P performed an IEE at school district expense. The report used background information, school records, tests of cognitive ability, visual-perceptual-motor skills, academic achievement, executive functioning and emotional functioning. There were discussions with the therapist and staff.

The student was found to be of average intelligence with a wide range of differences in sub scores. He was shown to be under stress. He has ADHD. Anxiety and depression were noted.

Using a discrepancy model, Dr. P found the student to be LD which affects the speed at which he works and the quality of his written expression.

Dr. P offers about sixteen recommendations. These include on-level instruction, many assists on organization and note taking, extended time for writing, assistive technology, cueing, feedback, counseling, emotional support and continuing psychotherapy.

Dr. P views the student's emotional issues as being a result of the LD. The student's written expressive skills are not as strong as his oral skills. The physical act of writing is difficult for him. The learning disability is in the area of processing speed. There was no FBA. (NT 125-130, 133, 142; S-11)

23. Dr. P agrees that the student is ED as well as LD. She feels LD is primary and ED is secondary. (NT 164, 165).

24. The parent provided Dr. P information for her evaluation. (NT 636, 637)

25. Dr. P did not observe the student at his school. (NT 171)
26. The school psychologist and the evaluation team considered the P report. The school district recognizes Dr. P's finding of LD by including her report in the RR and adding LD as an eligibility. (NT 24, 25, 85, 164; S-11)
27. The request for the IEE resulted in changes in the RR and IEP meeting dates as permitted by the settlement agreement. (NT 734-736; S-1)
28. Dr. P opines the student has done well at Private School. (NT 154)
29. The letters from the private psychologist and Private School are incorporated in Dr. P's report. (NT 436)
30. Dr. P disagrees with the school district psychologist's conclusion of ED. She sees the ED as secondary to the LD. (NT 141-150, 164, 184, 185)
31. Dr. P is not an expert in the Response to Intervention Model. (NT 192)
32. The parent sent a list of her objections to the RR of March 1, 2006 to the school district. In this she requested a due process hearing. (NT 30, 32; S-25)
33. The school district changed the RR meeting to accommodate the parent's desire to have her advocate present. (NT 827)
34. A meeting to review the RR of May 12, 2006 was set for May 12, 2006. The parent had her advocate at the meeting. The parent and her advocate disagreed with the RR. (NT 427, 428, 435, 436; S-11, S-13, S-14, S-15)
35. The parent received a copy of the RR of March 1, 2006 prior to the May 28, 2006 date to review it and develop an IEP. (NT 410; S-26)
36. The parent took an active part in the meeting that reviewed the RR. The OT report, RR and IEE were discussed. (NT 384, 385)
37. Since early 2002, occupational therapists have recommended the student use a computer to help handwriting issues. (NT 511, 512; SK-115)
38. The school district's OT evaluated the student as part of the RR process. She used a variety of tests. In her report she found his perceptual, perceptual-motor and fine motor proficiency skills to be average/high average; handwriting skills were intact; and musculoskeletal status was intact. The low score on the school district's OT evaluation of motor proficiency in upper-limb speed was a timed test. She saw no perceptual-motor or motor cause for slowness in writing. She opines this is executive functioning due to

the student's ADHD. Her conclusion was that there were no OT needs to support the curriculum.

The student writes with a warped grip, but it doesn't affect the production of writing. (NT 363-379, 381, 584; S-11, S-28)

39. The student uses a "dynamic" pencil grasp with a slight thumb overlay. He self-regulates his pressing too hard while writing. This does not slow his writing. (NT 382, 604)

40. The school district's OT opines that accommodations can be made to aid in writing processing. These include preprinted notes, keyboarding and assistive technology (computer) to reduce amount of handwriting. (NT 383, 387, 388)

41. The school district's OT opines that Dr. P's use of the Bender-Gestalt Test was not appropriate. (NT 376)

42. The parent pursued a private OT evaluation because she felt her concerns about the school district's OT evaluation were not answered. (NT 666)

43. The private OT evaluated the student in May 2000. She reviewed a previous P evaluation. She performed a motor proficiency test, a visual motor abilities test and a handwriting sample. His motor control is adequate when he takes his time. His execution of fine motor tasks is slow. He has adequate visual perceptual skills. Written expression difficulties are compounded by motor speed and mechanical aspects of handwriting and typing. His handwriting is neat and legible, but slow. Handwriting fatigue is typical with light pencil gripping.

The private OT therapist did not see a need for direct services at school. She felt consultative service "may" be of benefit. She would focus her attention on timed tasks. She suspects an underlying sensory processing problem. She recommends accommodations for the student's slow fine motor functioning such as small class size, keyboarding and assistive technology. (NT 524, 531, 532, 536-543, 553, 558, 564, 565, 574; SK-116-120)

44. The private OT did not have the school district OT's report at the time of her evaluation. (NT 554)

45. The private OT is not certified in evaluating sensory integration problems. (NT 24, 25)

46. The private OT stated she does not work on written expression, except the motor part such as processing speed. (NT 551, 552)

47. At the request of the parent, the student's private clinical psychologist wrote a letter to the school district on March 14, 2006. The parent suggested some of the content

of the letter. He expresses an opinion against the student returning to the school district and says this has caused anxiety to the student. (NT 79, 80, 81; S-22)

48. The student's private therapist has worked with him and his family for six years. Issues worked on include socialization, friends, school and coping at home. He diagnosed the student with anxiety, depression, oppositional behavior and learning disability. The student has multi-sources of anxiety. He is medicated with Paxil and Dexadrine. The student's concern with safety extends to the home.

The student has made progress developing coping skills. His emotional issues affect his academic performance. (NT 40-42, 71, 72, 91, 93 101, 102; S-11)

49. The student's private therapist worked at Private School as Director of Clinical Services for six years. (NT 52, 65)

IEP

50. There were problems scheduling the May 12, 2006 RR meeting and May 23, 2006 IEP meeting. The school district insisted on keeping the date. The parent and her advocate made the meeting. (NT 641-646, 669, 670-676; S-5, S-6, S-13, S-14, S-15, S-16)

51. The parent was invited to an IEP meeting to be held May 23, 2006. The parent requested the meeting be cancelled until after the due process hearing. The Executive Director of Special Education got the cancellation request on May 23, 2006.

Since the settlement agreement stated the IEP had to be completed by May 25, 2006 unless the parent requested a thirty day extension, the IEP meeting was held. The parent and her advocate did attend. (NT 446, 447, 449, 450, 451, 452, 687, 721; S-1, S-5, S-6)

52. The IEP of May 23, 2006 lists the student's present levels of academic achievement; his strengths and needs are stated; accommodations are stated; there is a broad measurable annual academic goal and support for staff is provided. The core of his needs are met through related services providing psychological counseling through weekly small group sessions, emotional support, mentoring, daily and weekly social skills group sessions. Further, there are thirteen program modifications and specially designed instructions (SDIs). These provide academic support, support for assignment completion, emotional support access, extra time for completing tests and work, note taking support, redirection, assignment book, further explanations, feedback sheet, conflict resolution facilitated by a school psychologist, support for the writing process and computer access.

The proposed placement is itinerant emotional support in his local high school. He would be in all regular education classes and receive his emotional support in a special education environment. (NT 463, 464, 466-469, 471-480; S-4)

53. The parent did not invite a representative from Private School to the IEP meeting. (NT 332).

54. The draft of the May 23, 2006 IEP had input from the school psychologist, the behavior specialist, coordinator of psychological services and the Executive Director of Special Education. (NT 839, 848)

55. Learning support is to be provided in the ES room. Support needed can come from the students or staff. (NT 869, 870; S-4)

56. At the school district OT's suggestion, keyboarding was added to the IEP at the IEP meeting. (NT 621, 622)

57. Due to discussion, changes were made to the draft IEP at the May 23, 2006 IEP meeting. A revised IEP was sent to the parent. At the meeting the parent rejected the program and placement by way of a Notice of Recommended Educational Placement (NOREP) and requested the second due process hearing. (NT 454, 683-685, 762-764; S-3, S-4)

58. The school district's OT opines the IEP addresses handwriting issues. (NT 386, 387; S-4)

59. The school psychologist opines the proposed IEP will meet the student's needs. (NT 75, 76; S-4)

60. The student's proposed program at the high school was explained to the parent at the May 23, 2006 IEP meeting. (NT 689-705)

61. The parent was emotional at the May 23, 2006 IEP meeting. (NT 697, 698, 741, 742)

62. The school district felt it did not have enough data to put a goal for writing output in the IEP. The information from Private School did not have the data. It was instead addressed through accommodations and SDIs. (NT 864-867; S-4)

63. The student has been resistant to using assistive technology, being taught typing and using the computer. (NT 758, 760)

64. The student would not miss any academic class time to receive his related services or accommodations/SDIs. (NT 482, 483)

65. The student will receive academic support 30 minutes a day in the emotional support classroom. (NT 473, 474; S-4)

66. Dr. P views the IEP academic goal as measurable, but seems minimal. (NT 151; S-4)

67. The school district is open to further IEP revisions. (NT 462, 494, 495)

68. The parent feels the student needs small class size with high level academics and with students without behavior problems. (NT 771)

OTHER

69. The student is learning to control his behavior and improving peer relationships. (NT 179, 180)

70. The student can elect to take a keyboarding class at the high school. (NT 873)

71. The school district is certain it has the staff and supports to provide for the student's safety. The school district has, over the last few years, revamped its emotional support program. (NT 486, 487, 491, 492)

72. The student's clinical psychologist opines the student got a lot better at Private School. At school he has mentoring, counseling and small classes. (NT 52, 53, 55, 63, 64)

73. The student should be able to transfer the social skills learned at Private School to the school district high school. (NT 185)

74. The student has shown anxiety over the prospect of leaving Private School and returning to his home school. (NT 54, 55, 58, 59)

75. The student's clinical psychologist will be available to the student if he returns to the school district to work through issues caused by this. (NT 89, 90)

76. The student participates in a summer stage program at the high school which includes other district high school students. (NT 111, 112, 755, 756)

77. The student has been involved in a weight loss program for about two years. Anxiety over a possible school change has caused a weight gain. (NT 234-237)

78. The parent has two other children who have attended the high school. One is still there. (NT 707)

79. The Executive Director of Special Education does not feel her past involvement with the parent makes it inappropriate for her to perform her role in the present dealings with the parent. (NT 812, 813)

Issues

1. Is the identification of the student as emotionally disturbed accurate?
2. Is the school district's recent Evaluation Report appropriate?
3. Is the proposed placement appropriate?
4. Were proper procedures followed in developing the proposed IEP?
5. Is the proposed IEP appropriate?

Discussion and Conclusion of Law

The student attended Private School, a private school for LD students, under a settlement agreement with the school district (F.F. 3). This was due to a traumatic experience that resulted in a due process hearing. While at Private School he did very well academically and made progress socially and emotionally (F.F. 6, 7). For a period of six years he has been in therapy for his anxiety and depression (F.F. 48). He is medicated for these as well as his ADHD.

The central issue of this hearing is whether the school district is offering FAPE. The IDEA 2004 requires that FAPE be provided to all students qualifying for special education services. The Supreme Court, in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), held FAPE is met by complying with IDEA's procedural requirements and by providing individualized instruction and support services to permit a child to benefit educationally from the instruction. While the law does not require school districts to offer optimal educational programs to maximize the child's potential, this standard is met only when the child's program provides more than a de minimus educational benefit.

Issues 1. and 2.

These two issues are best viewed together since identification for eligibility is part of the evaluation process. 20 U.S.C. §1414(b) establishes evaluation procedures. The reevaluation conducted by the school district was comprehensive and used a variety of assessments (F.F. 15). Parent information and information from other sources were used (F.F. 15). When the parent requested an IEE this was incorporated into the final version of the RR (F.F. 15). The RR is properly done.

The RR contains an OT evaluation. The district's OT evaluation concurs with the RR in finding written expression to be centered round the production of writing (F.F. 38) Writing is physically difficult for the student and causes him to need more time and accommodations (F.F. 38). This is not an area that direct OT services will help (F.F.38) The school district occupational therapist is very credible.

While the private occupational therapist hired by the parent is in some disagreement with the school district she also feels the writing problems the student has can be addressed through accommodations for written expression (F.F. 43). She is not qualified to evaluate for sensory integration (F.F. 45).

The heart of the argument over the results of the RR centers on the method used by the school district's psychologist. She used the Response to Intervention method as allowed by 20 U.S.C. §1414(b)(6)(B). Using this, the district did not find the student to be learning disabled. She found the student to be ED using the definition at 34 CFR §300.7(c)(4) (F.F. 17). This causes problems with written expression in the area of physically producing written work. The school psychologist is credible.

The parent disagreed with the RR and requested an IEE as permitted by the settlement agreement. Dr. P performed the IEE and, using the discrepancy model, found the student to be LD (F.F. 22). The school district decided, as a compromise to the parent, to include the P report and add LD as a secondary eligibility in the final RR. Dr. P found the student's needs to be in the area of speed at which he works and written expression. She sees ED as secondary to LD.

When all is said, we have a properly done RR with a statement of needs in the areas of written expressions and emotional support. For programming purposes the RR provides a sound basis for developing an IEP.

Issues 3., 4. and 5.

Since placement follows programming, these can be viewed together.

20 U.S.C. §1414(d) provides for developing an IEP. The student has no academic needs as indicated by his academic success. His needs are in the area of emotional support and written expression. The one goal in the IEP established academic success as a goal (F.F. 52). The low standard for the goal is of concern, but does not rise to the level of a fatal flaw. The IEP provides related service of weekly psychological counseling and weekly social skills group (F.F. 52). Academic support is to be provided in the emotional support room.

There are numerous accommodations and SDIs to accommodate written expression and ED needs (F.F. 52). Supports are in place for the student to be successful academically and social/emotionally. Meeting established needs through accommodations and SDIs is not an unusual programming strategy.

The parent was an active participant in both the review of the RR and the development of the IEP. In both instances changes were made based on her input. (F.F. 21, 26, 36, 57)

Finding the IEP is appropriate and is designed to provide meaningful benefit, I will move on to the placement issue. From Oberti through to today in IDEIA 2004 and

the Gaskin settlement, it is clear that placement decisions start with considering placing a student with nondisabled peers in his home school district to the maximum extent possible. In *Oberti v. Board of Education*, 995 F. 2d 1204 (34d Cic. 1993), the Third Circuit Court of Appeals provided guidance for determining whether a proposed placement conforms to LRE requirements. The court will consider (1) steps taken by the district to include the child in the regular classroom; (2) comparison of the educational benefits the student would receive in the regular classroom against the benefits the child would receive in the segregated classroom; and (3) the negative effects that inclusion may have on the other children in the regular classroom. *Id.* If it is necessary to place a child with a disability outside the regular classroom for all or part of the day, the proposed alternative must be evaluated to determine whether it provides for contact with nondisabled peers to the greatest extent possible.

Further, this is codified in 20 U.S.C. §1412(a)(5)(A). The student has made strong progress academically and socially at Private School (F.F. 7, 8). His therapist has seen progress and will provide therapy in the future (F.F. 48). The high school is an environment different from the one he left two years ago. The student has been able to enter the high school building and interact with school district children in the summer stage program (F.F. 76). The IEP has related services, accommodations and SDIs to support the placement in an itinerant emotional support program in his home school. (F.F. 52) To place the student at Private School would be to place him in an out of district setting with all disabled students. This would be a very restrictive placement.

Procedural Issues

The parent raised several claims of procedural flaws. The team that conducted the RR meets the requirement of 20 U.S.C. §1414(b)(1)(4)(A) as being made up of qualified professionals and the parent. The school district included the parent's IEE and expanded the eligibility category to LD. The IEP process followed the settlement agreement. The school district recognizes the IEP can be changed at anytime (F.F. 37). The parent fully participated, with the help of an advocate, in the entire process.

Any procedural errors that may have occurred do not rise to the level of fatal flaws. They did not change the outcome to the student (Appeals Panel Decision 1346).

The parent failed in her burden of proof. By a preponderance of the evidence I find that the school district provided FAPE to the student.

The LEA is ordered to take the following action

None.

Date

Kenneth Rose
Hearing Officer