

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

Student A.T.
Name of Child

Xx/xx/xx
Date of Birth

6812/06-07 LS
ODR File Number

September 25, 2006, October 18, 2006, October 25, 2006
Dates of Hearing

November 20, 2006
File Closed

Open Hearing

Parties to Hearing

Parent

Dates Transcripts Received:
October 7, 2006, October 18, 2006,
October 28, 2006

(Pro Se)

School District
Stanley Hamberger
York City School District
200 North Albemarle Street
York, PA 17403

Date of Decision:
November 27, 2006

District Representative
Steve Russell, Esq.
Susquehanna Commerce Center
221 W. Philadelphia Street
6th Floor
York, PA 17404

Kenneth Rose
Hearing Officer

Background

The student is a xx-year old resident of the York City School District. She attended part of kindergarten in the school district. She finished kindergarten in a private kindergarten. She attended first grade in the school district. She then moved to [state redacted]. The student returned for fifth grade. During sixth grade she transferred to the [redacted] School, a private school that specializes in teaching learning disabled students. This placement was by way of a settlement agreement between the parent and the school district. The settlement agreement called for the student to be evaluated by the school district in the 2005-2006 school year. It also established her pendent placement for the 2006-2007 school year to be the school district.

The student has a learning disability (LD/and Attention Deficit Disorder (ADHD). She is medicated for the ADHD.

The parent claims her input was not sought or included in the school district's Reevaluation Report (RR) and proposed Individualized Education Program (IEP). She claims that the RR and IEP's are inappropriate for the student.

Stipulations

1. The student's date of birth is xx/xx/xx.
2. The student is a resident of York City School District.

Findings of Fact:

1. The student started kindergarten in the district, but transferred to a private kindergarten. She attended the school district for grade one. Grade two she was in [city and state redacted]. For grade three and four in [city and state redacted]. During grade five she returned to the school district. For grades seven and eight she was at the Private School at school district expense. (NT-212, 516-518)

2. The student has a specific learning disability (SLD) in areas of word reading, decoding and written expression. (NT-553, 554; S-3)

3. The student is a positive student. She has trouble concentrating even when on medication (Ritalin). (NT-139, 140, 141, 143)

4. By way of a settlement agreement the school district paid for the student to attend the Private School for 2004-2005 and 2005-2006 school years. Transportation was provided. The school district had the right to evaluate the student at the end of the 2004-2005 school year. The student was to be evaluated at the end of the 2005-2006 school year. This was to be done by April 18, 2006. An IEP was to be developed by May 18, 2006. Pendency for the 2006-2007 school year was York City School District. The

district had no obligation for Private School tuition for 2006-2007 school year or transportation. (NT-529; S-1)

5. Dr. K, a private practice school psychologist, first evaluated the student in 1999. She found the student to have dyslexia. (NT-377)

6. On May 7, 2004 Dr. K. did an Independent Educational Evaluation (IEE) on the student funded by the school district. The student was found to have average cognitive ability and “double-deficit dyslexia.” (NT-379, 380, 465; S-2)

7. The school district chose not to evaluate the student at the end of the 2004-2005 school year or to request reports from the Private School as permitted by the settlement agreement. (NT-562, 563; S-1)

8. The school psychologist who conducted the RR of May 9, 2006 is employed by Lincoln Intermediate Unit and assigned to the school district. (NT-608)

9. The school psychologist evaluated the student at the Private School. She observed the student in the classroom. (NT-609, 610)

10. The RR has cognitive testing, achievement testing, review of records, review of Dr. K.’s IEE of 2004 and assessments from Private School. Attention and planning were measured. The Private School staff was interviewed. The student was found to have a SLD in word reading, decoding and written expression. She is on grade level in math. (NT-610, 616, 718; S-3)

11. The school district psychologist did not seek input from the parent for her evaluation. The parent’s input at the meeting to review the Evaluation Report (RR) was not included in the RR. The school psychologist thinks it is best practice to get parent input for a RR. (NT-494-497; S-3)

12. The school psychologist said she could have talked to the parent for input into the RR, but did not do it. (NT- 738, 739)

13. The school psychologist did not revise the RR to include any parent input from the IEP meeting of May 17, 2006 where the RR was discussed. The RR was changed, at parent’s request, to include grade equivalents. (NT- 740, 767; S-3)

14. The RR of May 9, 2006 found the student to have average cognitive ability. Attention and planning were average. Reading comprehension was average, but word reading, decoding and written expression were below average. (NT-621-624; S-3)

15. The school psychologist disagrees with Dr. K. on how much progress the student has made at the Private School. She thinks little progress has been made in sight word recognition, math calculation, or phonic decoding. (NT-725)

16. The Private School did not send information about the student until it was requested as part of their evaluation. (NT-228)

17. The parent made comments about the RR when it was reviewed at the IEP meeting. The parent objected to the RR of May 9, 2006. (NT-251, 522, 523; S-6)

18. A draft IEP was presented at the May 17, 2006 meeting. Changes were made to the draft IEP. (NT-221, 222, 534, 535; S-4)

19. The parent was an active participant in the IEP meeting. (S-10)

20. The school district did not consult with the Private School in developing the student's IEP. (NT-52, 53)

21. The IEP meeting of May 17, 2006 had a regular education teacher, two special education teachers, the parent, school district attorney, LEA representative, guidance counselor, principal, school psychologist and assistant principal present. (NT-533, 534; S-4)

22. The IEP team did not consider continuing the student at the Private School. (NT-257)

23. The IEP of May 17, 2006 had a properly constituted team. There are present educational levels for reading comprehension, decoding, math and written language. Goals were written for expressive language, reading and reading fluency. The goals are measurable. The fluency goal has blanks for rates; they are to be filled in at the start of the year. There are seven modifications and specially designed instructions (SDI) to support the student.

Placement is part time learning support (LS) with math, social studies and science co-taught in regular education classes. Electives and special subjects are regular education. (S-4)

24. The proposed IEP has current present educational levels based on norm referenced tests. (NT-471; P-23)

25. The school district reviewed the need for ESY for 2006 and decided it was not needed based on the student's success at the Private School. (NT-254, 255, 256; S-9)

26. The May 17, 2006 IEP meeting was within the settlement agreement time line. (NT-559, 560; S-1)

27. By way of a Notice of Recommended Placement (NOREP) the parent did not approve the IEP of May 17, 2006 due to lack of parent input and lack of consideration of other options. (NT-537; S-5)

28. The school district's view is that the parent's input in the May 17, 2006 IEP meeting was for her to agree to the pendent placement in the school district. This is based on the settlement agreement. They view the rejection of placement as not honoring the parent's commitment of the settlement agreement. (NT-569, 570)

29. On June 14, 2006 a second IEP meeting was held to review a second draft of the IEP. It contained some of Dr. K.'s recommendations including one on one reading and parent input. (NT-539, 542, 543, 544, 545; S-7)

30. The IEP of June 14, 2006 has blank spaces for the reading fluency goal. The reading rates were to be based on measures at the start of school. (NT-540, 541; S-7)

31. The IEP of June 14, 2006 has the student in regular education Algebra I, Social Studies and Science. These are co-taught by regular and special education teachers.

There is to be an assistive technology evaluation. (NT-545, 546; S-7)

32. The special education teacher did not stay for the entire IEP meeting of June 14, 2006. (NT-502)

33. The parent opines the IEP does not address all of the student's specific needs. (NT-498)

34. Dr. K., by conference call, talked with the school and parent about programming for the student. She doesn't think the Saxon Phonics Intervention program is individualized to the student. Dr. K. prefers a different program, Wilson Reading System. She recommended other methodologies such as RAVE-O. (NT-383-389, 426; P-12)

35. By way of a NOREP the parent rejected the June 14, 2006 IEP. (NT-548; S-8)

36. On July 13, 2006 a mediation session was held. A settlement was not reached and the parent asked for a due process hearing. The reasons were detailed in a letter dated July 17, 2006. The school district believed it was the parent's responsibility to send the Due Process Complaint Notice to ODR. This delayed the filing until August 1, 2006. (NT-349, 358, 362, 368, 502; P-21, P-22)

37. The third draft of the IEP was not presented at an IEP meeting. It was mailed to the parent and was to be discussed at the resolution meeting. It was presented August 18, 2006. The reading accommodation was expanded.

It's not clear who attended the meeting. (NT-509, 510, 551, 579, 580; S-11)

38. The parent feels the school district ignored her input in the entire process. (NT-520, 521)

39. The parent actively participated in all the IEP meetings. (NT-511, 512)

40. Dr. K. opines that with an appropriate IEP the student can be programmed for in a public school. It would have to be sufficiently intensive to close her learning gaps.

Dr. K. feels the student made significant progress at Private School. (NT-381-383, 407, 408, 437, 438; P-12)

41. Dr. K. opines the proposed IEP is not specific enough in levels, entry points, type of instruction and monitoring. She finds the IEP to be too “vague.” She opines that the school district’s IEP’s have improved, but are still not specific enough. (NT-390-406, 434-437, 466, 467; P-23)

42. Dr. K. does not think there are transition issues based on the emotional state of the student. Her concern would be transitioning of instructional programs. (NT-476, 477)

43. Dr. K. has not seen or evaluated the student since 2004. (NT-475)

44. The school district uses Saxon Phonics Intervention Program in reading and Saxon Math Program. They are research based. It is designed for grade four to adult. It tests current levels before instruction starts. It works toward reading to learn. The school district will also use Read 180 this year. Saxon Phonics Intervention Program is Orton-Gillingham based, as is the Wilson Program. (NT-235, 236, 242, 244, 433, 644, 658; S-8, S-11, S-16)

45. The author of the Saxon Phonics Intervention Program opines the student’s proposed IEP fits well with Saxon. (NT-665-673)

46. The student did not like her previous experience in the school district. She didn’t like being “pulled out” of class. She didn’t understand her class work. She says she felt stupid. She claimed headaches to avoid class. (NT-190, 191, 192)

47. The student takes part in a teen book club outside of school. With allowances she can keep up with the other girls in the club. (NT-181, 182, 187)

48. When the student entered Private School in sixth grade, she had low self-confidence and anxiety. She was easily frustrated. She needed help in decoding, spelling, written expression and logical awareness.

The student has progressed personally and educationally at Private School. (NT-48, 49, 50, 54, 59)

49. At Private School the student was assessed in reading formally and informally. On the Qualitative Reading Inventory (QRI) Number 4 she scored at middle school level. Decoding and fluency were weak. On the RAVE-O, a Wilson Reading tool, she showed difficulty with diphthongs, silent letters and certain suffixes.

The student's reading scores on the GATES were average. (NT-66, 67, 69, 75)

50. The student received about fifteen minutes a day of Wilson Reading Program at Private School. Parts of other programs are used. Total reading time was thirty minutes a day. (NT-79, 80, 82, 83)

51. The Private School makes educational plans for each student based on the information they have. The school day has core academic courses and small group reading, tutorial, study skills and advising. (NT-124, 125, 127)

52. Instruction at Private School compensates for student's learning difficulties. (NT-150-153)

53. At the Private School faculty communicates among themselves about students. There are five report periods and three conferences. (NT-146, 147)

54. The tutor at Private School communicates about the student with her teachers. (NT-52)

55. Class size at Private School is four to twelve students. There are no regular education students. (NT-153, 154, 173, 174)

56. The student enjoys the Private School educationally and socially. She feels her reading and writing have improved. (NT-193, 201)

57. The tutoring program at Private School is individualized to meet student needs. (NT-48)

58. The Private School did not follow all of the recommendations in Dr. K.'s 2004 IEE. (NT-618, 619)

59. The Private School transitions yearly about thirty to thirty-five percent of its students to regular education schools. A goal of the school is to prepare students to leave. (NT-158, 167, 168)

60. Dr. K. opines the Private School program is appropriate for the student. (NT-407, 408)

61. The student has made adequate progress at the Private School. (P-26)

Issues

1. Is the proposed program for the student appropriate?
2. Were proper procedures followed in the preparing of the IEP and NOREP?
3. Is the school district's proposed placement appropriate?

Discussion and Conclusion of Law

The student attended the Private School for the 2004-2005 and 2005-2006 school years. This was by way of a settlement agreement between the parent and the school district (FF- 4). The settlement agreement established a process of evaluation, programming and placement for the 2006-2007 school year (FF-4). The pendent placement for the 2006-2007 school year was to be the school district (FF-4). The issues of the hearing can be combined to whether, in the evaluating, programming and placement of the student, FAPE was provided.

The IDEA 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. This is further delineated in *Rose* by *Rose v. Chester County Intermediate Unit*, 25 IDELR 61 (ED. PA. 1996); *Board of Education v. Diamond*, 808 F. 2d 987(3rd Cir.) and *Polk v. Central Susquehanna I. U. #16*, 853 F. 2d 171, 183 (3rd Cir.) 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.

The first step of providing FAPE for the student is the reevaluation of the student. 20 U.S.C. §1414(c) established the criteria for a RR. The RR of May 9, 2006 used appropriate instruments, the student was observed in her educational setting and information was gathered from Private School (FF-9,10). Dr. K.'s IEE was used (FF-10).

The preponderance of the evidence shows a significant flaw occurred in the RR process. No input was sought from the parent (FF-11). The reason of lack of time does not excuse this (FF-12). Even after the RR was reviewed with the parent, the RR was not revised to include parent input (FF-13). This is inexplicable since a revision was made to include grade equivalents as requested by the parent (FF-13).

There can be no more important aspect of the process of developing an appropriate program for a student than parent input. The process starts with the evaluation. The RR states under Evaluations and Information provided by the parents: "None obtained for this evaluation." (S-3) The failure to obtain and include parent input for the RR is a fatal procedural flaw under *Rowley*.

Without a proper RR an appropriate IEP cannot be developed (See Special Education Opinion 1769).

Since there can be no appropriate IEP, there is no need to proceed to examining the IEP's and placement procedure. That being said, a few observations are in order. The school district did convene the initial IEP meeting in a timely fashion (FF-21). Parent input was included in the June 14, 2006 revision (FF-29). Dr. K.'s views were considered throughout the process (FF-14). The draft IEP of August 18, 2006 is not appropriate since it was not developed by the IEP team (FF-39). The fluency goal in the IEP's is not appropriate with the blanks left open (FF-23, 30).

Absent the providing of FAPE through a proper evaluation, program and placement process, the issue of the appropriate placement of the student during corrective action phase needs to be addressed. The settlement agreement pendency is clearly based on the evaluation, IEP and placement procedures providing FAPE. The parent has continued the student's placement at the Private School. This amounts to a unilateral placement by the parent.

There are three prongs to the decision to award reimbursement for a unilateral placement of a student at a private school. First, the district must show that it has offered the student a free appropriate public education (FAPE). Second, the parents, if the district does not prevail on the first prong, must show that the private school selected is appropriate for the student, and third, the Hearing Officer must weigh the equities in the case. Burlington School Committee v. Massachusetts Department of Education, 1984-85 EHLR 556:389 (1985); Florence County School District 4 v. Shannon Carter, 510 U.S. 712 6 L.Ed.2d 284, 114 S.Ct. 361 (1993)

The school district recognized the appropriateness of the Private School by paying for the student to privately attend it (FF-4). The student has made progress socially and academically at the Private School (FF-48). The Private School provides specialized instruction for LD students (FF-51, 52). The Private School is appropriate for the student.

34 CFR §300.403(c)(d) gives the Hearing Officer authority to order tuition reimbursement when FAPE is denied by a school district.

The LEA is ordered to take the following action

1. Immediately conduct an appropriate reevaluation of the student.
2. After the RR is developed, an IEP will be developed without delay.
3. Should the placement of the student be determined to be the school district, transition to the school district should be at a natural educational break such as end of a school holiday period or report card period.

4. The school district will pay the tuition and transportation of the student at Private School until FAPE has been provided.

5. The school district will reimburse the parent for transporting the student from the start of the 2006-2007 school year to the point FAPE has been provided. The mileage rate will be the IRS rate.

Date

Kenneth Rose
Hearing Officer