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CH
Name of Child

Xx/xx/xx
Date of Birth

7013/06-07 AS
ODR File Number

December 12, 2006, January 29, 2007
Dates of Hearings

February 5, 2007
File Closed

Closed Hearing

Parties to Hearing

Parents
Mr. and Mrs.

Dates Transcripts Received:
January 10, 2007
February 2, 2007

Parent Representative
Frederick Stanczk
179 N. Broad Street
Doylestown, PA 19901

Date of Decision:
February 19, 2007

School District
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Kenneth Rose
Hearing Officer

Background

The student is a xx year-old student of the Souderton Area School District. He is an eligible student with a Specific Learning Disability (SLD) in the areas of reading, writing and math. He has been diagnosed with Attention Deficit Disorder (ADD). He was the subject of a due process hearing at the end of last school year. HO Myers found a denial of FAPE over a several year period and ordered:

- 1. The school district's current programming for student is not appropriate.*
- 2. The school district shall provide Orton-Gillingham based language arts instruction to student in classes of 4-7 students or fewer.*
- 3. The school district shall insure that student meets with a faculty advisor at the beginning and end of each day for assistance in organization and structure.*
- 4. The school district shall provide to student 660 hours of compensatory education.*
- 5. Student's parents are not entitled to reimbursement for privately-secured audiological and vision evaluations.*

This decision was appealed and the Appeals Panel found in Appeals Panel Decision 1750 that:

- 1. The provision of the hearing officer's order that mandates the Orton-Gillingham reading methodology and the class size of the student's placement are REVERSED.*
- 2. All other aspects of the hearing officer's order are AFFIRMED.*
- 3. Furthermore, as the student's pendent placement is an inappropriate program, the Individualized Education Program (IEP) team shall convene within 30 days of the date of this order to develop an appropriate program.*

Pursuant to the Appeals Panel Decision an IEP was issued on August 25, 2006. The parents rejected the IEP and placement offered by the school district. The parents informed the school district at that time that they were going to have the student attend [redacted] (Private School).

The parents contend the proposed IEP is inappropriate and request tuition reimbursement for their unilateral placement of the student at Private School.

Stipulations

1. The student is a resident of the school district.
2. The student is an eligible student with an SLD in the areas of reading, writing and math.

Findings of Fact

1. The student was first identified as a child with a disability in first grade due to problems with reading, writing, math and organization. He also had mild ADD. (NT-35, 36, 37)

2. The student's last Reevaluation Report (RR) was October 4, 2005. It states a possibility of ADD. He was found to have low average intellectual ability. Academic Achievement was:

- PSSA (Grade 5) – Basic in reading and math.
- PSSA (Grade 5) – Proficient in writing assessment
- Woodcock Johnson Achievement Test:
 - Word Reading-23%ile
 - Reading Comprehension – 68%ile
 - Pseudoword Decoding – 10%ile
 - Spelling – 2%ile
 - Math Reasoning – 25%ile
 - Numerical Operations – 18%ile

Needs were in many areas of reading and math; as well as attention in the classroom. (NT-48, 54; P-8)

3. A hearing officer's decision was issued June 5, 2006. The student's program was found to be inappropriate. An Orton-Gillingham program with a class size of four to seven or fewer students was ordered (this was reversed in appeal). The student was to meet with a faculty advisor at the start and end of the school day. (NT-41; P-5, P-6)

4. The parents see organization needs. The student is not organized in his school work and forgets his books. Until eighth grade, a set of social studies books were kept at home. (NT-39, 60)

5. In the past the school district and the parents have discussed the issue of attentiveness in class. (NT-345, 346)

6. The parents are not currently concerned with the student's ADD. They do not want the student taking Class III drugs due to adverse effects. He did take medication in seventh grade.

The parents have declined to have the student take a Behavior Assessment (BA) because they do not see a behavior problem. (NT-38, 45, 46, 53, 74, 75, 194, 195, 196, 276, 277)

Proposed IEP of August 25, 2006

7. On August 25, 2006 an IEP was developed. It contained changes due to input of the parents. The IEP's Present Levels of Academic Achievement and Functional Performance are taken from the RR of October 2005 and information from progress in eighth grade. There are goals for decoding, reading fluency, reading comprehension, spelling, writing and math.

There are an array of SDI's addressing uses of Wilson Reading System, Saxon Math, books on tape, word processor, Franklin Speller, calculator, testing in learning support (LS) class, reading of tests, small structured reading, English and math classes, extended testing time, checking on on-task behavior and preferential seating.

Under Related Services, a Behavior Support Specialist is to develop strategies for the student to maintain focus, attention and concentration; also, an FBA is to be done. All this is pending parent approval.

There are relatively current reading fluency scores. The vocabulary and reading scores are broad grade level scores. The Pre-Algebra levels are subjective statements. Writing skills are also subjective statements based on PA State Writing Rubric. The writing goal uses the PA Writing Assessment Domain Scoring Guide as its measure for reaching the goal. (NT-44-47, 73, 291-300; P-4, P-8)

8. The decoding, reading fluency, reading comprehension, spelling and math goals have no objective basis on which to measure progress. They are based on objective measures to be done later. The writing goal is based on the PA Writing Assessment Domain Scoring Guide with no starting point listed.

Objective starting points for goals in the IEP were to be set by testing after the school year began. (NT-67-70, 303-314; P-4)

9. The August 25, 2006 IEP has no measurable annual goal for organization. There are several SDI's that address organization. (NT-63, 64; P-4, P-5)

10. There are thirteen SDI's to support the IEP goals and meet the student's needs. They specify the Wilson Reading System and Saxon Math. Aids for spelling, calculation, books on tape, special testing location, small classes for English and math, check-ins and preferential seating are included. (NT-63, 64, 314-319, 373; P-4)

11. The SDI providing for the student to meet with a teacher at the start and end of the day uses the phrase “Opportunity to check in with...”

The school district views this as the student will meet with the teacher. This meeting in the morning would be as the teacher is on bus duty in the cafeteria. The teacher would then take the student to a classroom. The afternoon check-in would be in the support room. (NT-386, 387)

12. It is the school district’s practice to administer the Woodcock Johnson Assessment to students prior to developing an IEP. It was not done in this instance. (NT-363)

13. The school district did not request permission of the parents to test the student to obtain objective data on which to base the goals of the August 25, 2006 IEP. The student was available for testing during the summer of 2006. (NT-67, 354)

14. The parents had input in developing the August 25, 2006 IEP. Changes were made to the IEP at the request of the parents. (NT-198-200, 243, 288, 289; P-4)

15. The parents contend they would accept an appropriate IEP from the school district. (NT -228, 229, 270)

16. A concern of the parents is that they don’t know how writing skills will be taught through the IEP. (NT-241)

17. The school district is ready to hire a level-one certified Wilson Reading System Specialist for the student. (NT-351, 352)

18. At the conclusion of the August 25, 2006 IEP meeting, the parents rejected the IEP and informed the school district that the student would not attend the school district in the fall. He was going to attend Private School. (NT-189, 335, 342)

Private School

19. On January 2, 2006 the parents applied for the Private School summer program. This was done on the advice of his advocate. The application for this school year was June 2006. The parents also applied to another private school. (NT-124, 165, 168, 169)

20. Last school year (2005-2006) the parents started looking at private schools due to their dissatisfaction with school district programs.

The parents applied to Private School in late June 2006. The contract to attend was signed in August 2006.

The parents looked at two other private schools besides Private School. (NT-42, 230 284)

21. The student attended summer school at Private School in 2006. (NT-81)

22. Private School is a state licensed private school for students with learning differences. Class size is ten or less. Some students receive additional one-on-one language training. The curriculum is a typical ninth grade curriculum. Their reading approach is Orton-Gillingham. Each student gets an Individualized Learning Profile. They train their staff in teaching reading. They do diagnostic testing to prescribe their instruction. (NT-78, 86, 88, 93, 126, 136, 137; P-2)

23. At Private School the student receives an Orton-Gillingham reading program, writing, math, individual tutoring, history, science, English and health. He also gets help in organization. (NT-234-239; P-3)

24. The student is in one-on-one language arts. (NT-86)

25. At Private School they work on organization with the student. (NT-55, 56)

26. The student is doing well academically at Private School. The parents are satisfied with his progress. His grades range from "A" to "C". He is able to do his Private School homework without assistance. (NT-101-109, 174, 202-204, 218, 219, 246, 247, 268-270; P-3)

27. The previous Hearing Officer's decision found that Private School could provide instruction to meet the student's needs. (NT-247, 248; P-5)

28. The student's sibling also attends a private school. (NT-260)

Issues

1. Is the proposed IEP appropriate in the areas as stated in Mr. Stanczk's letter of December 4, 2006? (These include a challenge of the goals for reading and comprehension; the math goal.)

2. Are the parents due tuition reimbursement for the current school year?

Discussion and Conclusions of Law

This hearing is focused on whether FAPE was provided by the school district by offering an appropriate IEP as ordered by the Appeals Panel in Appeals Panel Decision Number 1750 and in conformity with the upheld portions of HO Myers' decision. The issue of tuition reimbursement occurs only if a denial of FAPE is determined.

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.”

IDEIA of 2004 requires FAPE be delivered by way of an IEP which states child’s abilities, outlines goals and states services the child will receive. Oberti v. Board of Education, 895 F. 2d 1204 (3d Cir. (1993).

First, the contention by the parents that the IEP was not developed within the thirty day timeline issued by the Appeals Panel (P-6) fails because the IEP’s development was within the time frame. The Appeals Panel Decision was dated July 26, 2006 (P-6) and the IEP was developed August 25, 2006. This is within thirty days even if we don’t seek what date the school district received the decision.

The IEP is comprehensive, but fails to provide FAPE (FF-7-11). 34 CFR §300.320(2)(i) states that the IEP must have measurable annual goals. The measurable annual goals listed in the IEP are; (P-4)

1. Upon administration of the WADE (Wilson Assessment of Decoding and Encoding), the student will achieve mastery of at least 3 steps beyond the baseline, using the Wilson Language System.
2. Given a reading passage at his instructional reading level, (tbd based on assessment) he will increase his reading fluency by one grade level.
3. He will increase his reading comprehension skills one grade level beyond baseline.
4. The student will increase his spelling one complete grade level from baseline.
5. Given a prompt to write a narrative, informational, or persuasive writing piece, he will produce a sample that scores within the proficient range in the 5 scorable domains of the PA Writing Assessment Domain Scoring Guide.
6. The student will increase his math computation and fluency one grade level from baseline.

For a goal to be measurable there needs to be an objective starting point upon which to measure progress. If we look to the present levels of performance first there are scores from a RR that are about ten months old. Looking at the present levels on page seven of the IEP they fall short of providing a starting point for measurement. The vocabulary and reading comprehension levels are broad grade levels; the writing skills are based on the subjective PA State Writing Rubric; the math levels are a narrative; decoding is expressed in a broad narrative; and fluency does have an objective score using seventh grade norms (FF-7). Using the PA State Writing Rubric as a measure of progress was found to be subjective and general in Appeals Panel Decision 1603. Even if the present levels were construed to be a basis of measurement, they would be out of date at the time of the August 25, 2006 IEP meeting. The student attended a summer program at Private School that addressed some of his needs and may have changed his performance levels (FF-21). Using a broad grade level does not give a precise measurement. A grade level may be anywhere within the indicated grade year, a one year range.

The school district could have tested the student prior to the development of the IEP, but chose not to (FF-13). The school district argues that the student would be tested at the start of the school year to establish object measurements (FF-8). It must be remembered that a part of HO Myers' finding a failure of FAPE was based on vague and unmeasurable goals (P-5). To expect the parents to accept an IEP without measurable annual goals would be akin to asking them to buy a "pig in a poke." Without measurable annual goals you cannot know what progress is expected.

HO Myers' order stated "The school district shall insure that student meets with a faculty advisor at the beginning and end of each day for assistance in organization and structure." (P-5) This is addressed in the IEP under SDI's by giving the student the "Opportunity" to check-in with the IEP teacher at the beginning and end of the day (FF-11). The school district's contention that this is a mandatory meeting is not credible. (FF-11) It is too vague.

A preponderance of the evidence shows the IEP is not appropriate and does not provide FAPE. The measurable annual goals are vague and unmeasurable.

Finding the denial of FAPE, the reimbursement issue must be addressed. 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 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. 7 1265 L.Ed. 2d 284, 114 S. Ct. 361 (1993)

This was confirmed when, in Florence County School District Four v. Carter, the United States Supreme Court held that:

“In School Comm. Of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369 (1985), we held that IDEA’s grant of equitable authority empowers a court to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act, ‘...In cases where cooperation fails, however, ‘parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement.’; Id., at 370. For parents willing and able to make the latter choice, ‘it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.’ Ibid.”

The first prong of **Burlington** has been met. The Private School is a school that specializes in teaching students with learning differences (FF-22). It individualizes its programs to the needs of the individual students (NT-22). It has an intensive reading program (FF-22,23). The student has had success at Private School.

The equities balance in favor of the parents. Given the opportunity, the school district did not provide FAPE. As stated by HO Myers, the existing program for the student is inappropriate. There being no pending appropriate program and the school year about to begin the parents needed to find a program for the student. The school district’s contention that the parents never planned to send the student to the school district may be true, but does not excuse the failure to provide an appropriate IEP.

In closing, this hearing officer concurs with HO Myers that the school district is capable of programming for the student within the district. The student’s needs are not so unique or severe that a public school cannot meet them, but an appropriate IEP is needed.

The LEA is ordered to take the following action

1. The proposed IEP of August 25, 2006 is inappropriate and does not provide FAPE.
2. The school district is ordered to convene the IEP team within 30 days to develop an appropriate IEP.
3. The LEA shall reimburse the parents for tuition to Private School until an appropriate IEP is developed and placement determined. The reimbursement will include the regular tuition (\$29,800 per year) and the individual tutorial (\$8,400 per year).
4. The parents will be reimbursed for transportation costs at the IRS rate.

Date

Kenneth Rose
Hearing Officer