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Decision

Due Process Hearing for JT
Date of Birth: xx/xx/xx
File Number: 7870/07-08LS

Dates of Hearings:
January 7, 2008; January 23, 2008; March 6, 2008; March 14, 2008

CLOSED HEARING

Parties:
Mr. and Mrs.

Palisades School District
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Kitnersville, PA 18930

Date Transcript Received:
Date Closing Arguments Received:
Date of Decision:
Hearing Officer:

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March 22, 2008
April 7, 2008
April 22, 2008
David F. Bateman, PhD

I. BACKGROUND

Student is a xx-year-old student in the Palisades School District. The main dispute for this Hearing was his eligibility for services. The Parents allege eligibility for Section 504/IDEA and a specific learning disability. As a result of this Hearing they are seeking reimbursement for an independent educational evaluation, compensatory education for a denial of a free appropriate public education, and eligibility for services under the Individuals with Disabilities Education Act and Section 504/Chapter 15.

Student is currently eligible for special education and related services as a student with a learning disability. From March 2006 to March 2007 he received no special education and received A's and B's in the regular education classroom. In March 2007 the District completed a reevaluation report and found Student no longer eligible for special education and related services.

This Hearing was delayed multiple times due to scheduling problems, hiring of an attorney, change in attorneys, and problems with witness availability.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age (S-9, p. 1).
2. Student is a resident of the District (S-9, p. 1).
3. The Parents and the District reached a memorandum of understanding on October 10, 2005 regarding implementation of a multisensory reading program (S-34). As a part of the memorandum, Student would receive Wilson Reading instruction by the District (NT 317).
4. An IEP meeting was held on June 2, 2006 (S-1). This IEP was in place for Student's sixth grade year.
5. Student's sixth grade PSSA scores indicate he achieved at the advanced level in reading and math (S-21).
6. The Parent sent an email to the District on January 2, 2007 indicating a concern over Student's grades (S-29).
7. An IEP was held on January 19, 2007 (S-2). The team added a component that the Parent would be notified whenever Student's grade dipped below a B (S-2, p. 8; NT 35). Additionally, the IEP states: Currently Student does not receive direct services from the Learning Support teacher. In the event the consultative services included in the IEP are not sufficient to adequately address the needs related to Student's

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents' evidentiary exhibits will be designated "P" followed by the relevant exhibit number. Findings of Fact will be designated by "FF" followed by the relevant fact number.

disability (reading and English), the parent will contact the district to request an IEP meeting (S-2, p. 10).

8. On February 5, 2007 and March 27, 2007 the science teacher sent emails to the Parent regarding late assignments (S-29, p. 2-3).
9. Teacher feedback on March 22, 2007 indicate he is meeting his goal of receiving a B or higher in each marking period in Language Arts class (S-24, p. 2).
10. On March 2, 2007 the Parents requested a meeting to discuss Student's progress on his IEP (S-4).
11. On April 5, 2007 the District sent a letter to the Parents regarding notices to meetings, phone message, implementation of the IEP, and unprofessional conduct during meetings by teachers (S-5).
12. The District issued a reevaluation report on May 31, 2007 (S-9). This report found him no longer eligible for special education and related services as a student with a learning disability (S-9, p. 9). Specifically, the report states Student has not received special education services for the past year, and yet has been able to achieve at an appropriate level in the regular curriculum in sixth grade. In sum, Student was found to be functioning well enough in the classroom and on other measures of achievement to indicate that specially-designed instruction no longer appears to be required for his academic success (S-9, p. 9).
13. On June 7, 2007 the Parents requested an independent educational evaluation due their disagreement with the District evaluation (S-11).

14. Student received advanced scores on the PSSA in both reading and mathematics in sixth grade (S-21).
15. Student's grades for sixth grade indicate all A's and B's (S-23). His language arts teacher said there was no reason to give special accommodations to Student (NT 361) except for extra time on writing assignments.
16. The District sent a letter to the Parent on June 21, 2007 stating they would continue to identify Student as eligible for special education services, that the Parent would withdraw her request for an independent educational evaluation (S-14). The District changed its determination that Student was now eligible for special education and related services (S-14, p. 12).
17. The Parent sent a letter to the District on June 28, 2007 reiterating her request for an independent educational evaluation (S-15).
18. The Parent obtained an independent educational evaluation from Dr. G on July 27, 2007 (S-18). The report found Student has an adjustment disorder, reading disorder, writing disorder, learning disorder, and problems with visual processing (S-18, p. 22).
19. On August 1, 2007, the Parent sent a letter to the District regarding team assignments for the sixth grade year (S-19).
20. In September 2007, the reading specialist completed an observation of his reading ability (S-46). He was found to be at the instructional level for seventh grade (NT 278).

21. On September 6, 2007, the District issued a Notice of Recommended Educational Placement (NOREP) proposing a discontinuation of special education services and placing Student in full-time regular education (S-26).
22. For the 2007-2008 school year, Student is on the case role of Ms. H (S-47).
23. Dr. G completed additional testing on October 13, 2007 (P-3). She determined that Student had a non-verbal learning disorder (P-3, p. 5).
24. In November 8, 2007 the District issued a permission to evaluate for purposes of a gifted evaluation (S-37). The Parent did not approve hoping for no more evaluations on Student (NT 118).
25. On December 17, 2007 the District sent a letter to the Parents stating they feel additional testing is necessary to make a determination for gifted eligibility (S-38). The District at that time also issued another permission to evaluate, which has not been returned by the Parents (NT 120).
26. Ms. Y completed an audiological evaluation on December 9, 2007 (P-1). The report states Student exhibits some delays in auditory processing ability that could cause him to have more difficulty processing spoken language in noise, to keep up with lengthy lectures or oral discussions, and shows some weaknesses in auditory learning ability (P-1, p. 3).
27. Student's first quarter report card for seventh grade indicates an A in pre algebra, B in social studies, B in English, C in reading, C+ in science, A in band, A+ in well/fitness, and B in art (S-43).

III. ISSUES PRESENTED

1. Are Parents entitled to reimbursement for an independent educational evaluation?

2. Is Student an eligible student under the Individuals with Disabilities Education Act?

3. Is Student an eligible student under Chapter 15/Section 504 of the Rehabilitation Act?

4. Is Student eligible for compensatory education for inappropriate services for a denial of a free appropriate public education for the past two school years?

IV. DISCUSSION AND CONCLUSION OF THE LAW

Independent Educational Evaluation²

An independent educational evaluation (IEE) is an evaluation “conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.”³ Parents of a child with a disability have the right to obtain an IEE of their child.⁴ Upon request, each LEA must provide information to parents explaining where an IEE may be obtained.⁵ Whenever

² 34 C.F.R. § 300.502

³ 34 C.F.R. § 300.502(a)(3)(i)

⁴ 34 C.F.R. § 300.502(b)(1)

⁵ 34 C.F.R. § 300.502(a)(2)

parents obtain an IEE, the public agency must consider the evaluation when making any decision regarding provision of a FAPE to the child with a disability. In the event that there is a due process hearing, the IEE may be presented as evidence.⁶

The "IEE" issue is governed by 34 CFR § 300.502. It provides that, if a parent disagrees with a school district's evaluation and a hearing officer finds the district's evaluation was not appropriate, an independent educational evaluation shall be at public expense. As the case law has evolved, tribunals sometimes also discuss whether the IEE provided useful information, and one court has said that the parent's disagreement with the district's evaluation need not be fully formed before they obtain the IEE.⁷ However, no court has said reimbursement for an IEE can be ordered without (sooner or later) an actual parental disagreement, and no court has said that reimbursement for an IEE can be ordered if the school district's evaluation satisfied the regulatory requirements for special education evaluations.

The Parents clearly expressed disagreement with the District's evaluation. However, a careful review of the evaluation developed by the District (S-9) indicates it has all the regulatory components required. Not only that, it has important components that are clearly missing from the independent evaluation, information from his teachers. The IEE contains information not supported by testimony by the teachers or his performance in school (NT 259-268), such as a description that he requires academic accommodations to complete all writing tasks (P-3, p, 8). The report also states he evidences numerous characteristics consistent with a nonverbal learning disability. There is no supporting evidence from the testimony of individuals who have worked

⁶ 34 C.F.R. § 300.502(c)

⁷ *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 31 IDELR 27 (3rd Cir. 1999).

with him. There is also, little information, if any, that adds to the evaluation earlier developed by the District. After spending a considerable amount of time reviewing the IEE it does not contain supportable documentation warranting reimbursement.

Reimbursement for the independent education evaluation is not warranted.

Student's Eligibility

The next question that needs to be addressed is Student's eligibility for special education and related services. It will be followed by a discussion about whether he is eligible for a Chapter 15/Section 504 plan.

Legal standard

Before there is a discussion regarding Student's educational placement, a review of the necessary components of the law is appropriate

The definition for a learning disability is:

§300.8 Child with a disability.

(a) General. (1) Child with a disability means a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deafblindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with §300.38(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

(10) Specific learning disability. (i) General. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

§300.307 Specific learning disabilities.

(a) General. A State must adopt, consistent with §300.309, criteria for determining whether a child has a specific learning disability as defined in §300.8. In addition, the criteria adopted by the State--

(1) May prohibit the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability as defined in §300.8;

(2) May not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability as defined in §300.8;

(3) Must permit the use of a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures described in §300.304; and

4) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability as defined in §300.8.

(b) Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§300.308 Group members.

The determination of whether a child suspected of having a specific learning disability is a child with a disability, as defined in §300.8, is made by the child's parents and the group described under §300.306(a)(1)

that--

(a) Is collectively qualified to--

(1) Conduct, as appropriate, individual diagnostic assessments in the areas of speech and language, academic achievement, intellectual development, and social-emotional development;

(2) Interpret assessment and intervention data, and apply critical analysis to those data;

(3) Develop appropriate educational and transitional recommendations based on the assessment data; and

(4) Deliver, and monitor specifically designed instruction and services to meet the needs of a child with a specific learning disability; and

(b) Includes--(1) A special education teacher;

(2)(i) The child's general education teacher; or

(ii) If the child does not have a general education teacher, a general education teacher qualified to teach a child of the child's age; and

(c) Other professionals, if appropriate, such as a school psychologist, reading teacher, or educational therapist.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§300.309 Determining the existence of a specific learning disability.

(a) The group described in §300.308 may determine that a child has a specific learning disability if--

(1) The child does not achieve commensurate with the child's age in one or more of the following areas, when provided with learning experiences appropriate for the child's age:

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

(2)(i) The child fails to achieve a rate of learning to make sufficient progress to meet State-approved results in one or more of the areas identified in paragraph (a)(1) of this section when assessed with a response to scientific, research-based intervention process; or

(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, or a pattern of strengths and weaknesses in performance, achievement, or both, relative to intellectual development, that is determined by the team to be relevant to the identification of a specific learning disability, using appropriate assessments consistent with §§300.304 and 300.305; and

(3) The group determines that its findings under paragraph (a)(1) and (2) of this section are not primarily the result of--

- (i) A visual, hearing, or motor disability;
- (ii) Mental retardation;
- (iii) Emotional disturbance;
- (iv) Cultural factors; or
- (v) Environmental or economic disadvantage.

(b) For a child suspected of having a specific learning disability, the group must consider, as part of the evaluation described in §§300.304 through 300.306, data that demonstrates that--

(1) Prior to, or as a part of the referral process, the child was provided appropriate high-quality, research-based instruction in regular education settings, consistent with section 1111(b)(8)(D) and (E) of the ESEA, including that the instruction was delivered by qualified personnel; and

(2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, was provided to the child's parents.

(c) If the child has not made adequate progress after an appropriate period of time, during which the conditions in paragraphs (b)(1) and (2) of this section have been implemented, a referral for an evaluation to determine if the child needs special education and related services must be made.

(d) Once the child is referred for an evaluation to determine if the child needs special education and related services, the timelines described in §§300.301

and 300.303 must be adhered to, unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in §300.308.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

§300.311 Written report.

(a) For a child suspected of having a specific learning disability, the evaluation report and the documentation of the determination of eligibility, as required by §300.306(a)(2), must include a statement of--

- (1) Whether the child has a specific learning disability;
- (2) The basis for making the determination, including an assurance that the determination has been made in accordance with §300.306(c)(1);
- (3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;
- (4) The educationally relevant medical findings, if any;
- (5) Whether the child does not achieve commensurate with the child's age;
- (6) Whether there are strengths and weaknesses in performance or achievement or both, or there are strengths and weaknesses in performance or achievement, or both, relative to intellectual development in one or more of the areas described in §300.309(a) that require special education and related services; and
- (7) The instructional strategies used and the student-centered data collected if a response to scientific, research-based intervention process, as described in §300.309 was implemented.

(b) Each group member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the group member must submit a separate statement presenting his or her conclusions.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

This case is unique in that Student was identified as eligible for special education and related services, but after an evaluation is no longer eligible.

The director of special education for the District testified Student did not need special education because the student was doing well in school and has not required direct services for over a year (NT 602-603, 605). He did state he was willing to continue providing services to Student while awaiting the results of an independent educational evaluation (NT 611).

The psychologist for the District who completed the evaluation of Student testified he is not eligible for special education on the whole (NT 192-195). She discussed the confirmatory information from the grades he had been receiving without special education help (NT 194).

Student's sixth grade regular education teacher did not find that he asked for instructions to be repeated, nor did he ask for clarification any more than other students (NT 254); she also did not notice a handwriting problem (NT 256), nor did she notice problems listening and recalling (NT 257). His seventh grade teacher (Ms. H) stated she did not see Student struggle with reading and his writing was comparable to other students (NT 361-362). There was no indication of academic problems from his other seventh grade teachers.

As noted above, eligibility for special education and related services is contingent upon meeting a two-part test. A child needs to have a disability and needs to require specially designed instruction. There was no indication as a part of the testing that Student has a disability. There is no evidence that Student requires specially designed instruction. None of the teachers who work with him indicates a need for specially designed instruction.

The determination that he is not eligible in addition to the extensive testimony of those who work closely with him indicating no need for specially designed instruction clearly indicate to this Hearing Officer that Student is not eligible for special education.

Chapter 15/Section 504 Eligibility

Commonly referred to as the "Rehab Act," or "Section 504," this law authorized federal funds to be paid to institutions after they comply with regulations concerning the education of students with disabilities (and withholding of funds for noncompliance). The main component of Section 504 of the Rehab Act states:

"No otherwise qualified individual with handicaps shall solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (29 U.S.C. Sec. 706).

This act protects from discrimination any person, including students who meet one of three criteria. Any person who

"(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" (29 U.S.C. Sec. 706)

is considered as having a disability under this law. For the purposes of Section 504, major life activities include: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The law protects individuals who are discriminated against both intentionally and unintentionally. Under Section 504, individuals who have a disability might need assistance to qualify for the related services necessary for them to benefit from education. In addition, Section 504 has provisions for non-discriminatory employment.

The only testimony as a part of this Hearing indicating Student had any problems in school came from the independent educational evaluation (P-3). There is no evidence supporting his eligibility for a Section 504/Chapter 15-service agreement.

Parents Claim for Compensatory Education

Parents make a claim for compensatory education. Compensatory education may be an appropriate equitable remedy only when the responsible educational authority has failed to provide a child with a disability with an appropriate education as required by the IDEA. The purpose of compensatory education is to replace lost educational services. *See Todd v. Andrews*, 933 F.2d 1576 (11th Cir. 1991). *See also Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); (An IDEA eligible student is entitled to an award of compensatory education only if FAPE is denied by the school district); and *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996).

The clear and abundant evidence presented in this case is that Student made good grades in his classes, required no accommodations to make those grades and did well on the PSSA's. There was no testimony or evidence presented indicating academic problems in school that were not handled appropriately by the regular education teacher. Therefore, an award of compensatory education cannot be supported.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the Student is not eligible for special education and related services as a student with a disability under either Chapter 14/IDEA or Chapter 15/Section 504. The Parents are not entitled to reimbursement for the independent educational evaluation, and Student is not entitled to compensatory education for a denial of a free appropriate public education.

Date

Hearing Officer