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DECISION

Due Process Hearing for CC

ODR File No. 7939/07-08 LS

Date of Birth: xx/xx/xx

Date of Hearing: October 29, October 30, 2007 – Closed Hearing

Parties to the Hearing:

Representative:

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Hearing Officer: Debra K. Wallet, Esq.

Record Closed: January 2, 2008

Date of Decision: January 17, 2008

BACKGROUND:

Student is a xx-year-old (date of birth xx/xx/xx) student attending the [redacted] High School within The School District of Philadelphia [hereinafter School District]. Although Student has average intellectual ability, she has been diagnosed with a Specific Learning Disability in reading. Because of her age, Student is also eligible for transition services.

Parent's due process complaint requests compensatory education from the 1999-2000 school year through the 2006-2007 school year, with the exception of the 2005-2006 school year when the School District was not the Local Educational Agency (LEA).

The legal issues to be decided are the application of the statute of limitations and the exceptions thereto under The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* [hereinafter IDEIA], the provision of appropriate programs and placements for those years not barred by the statute of limitations, and the School District's Child Find obligations.

ISSUES:

1. Are claims prior to July 27, 2005¹ barred by the statute of limitations?
2. Does either of the exceptions to the two-year limitation period apply in this case?
3. Was Student provided FAPE from July 27, 2005 through the balance of the summer?
4. Was the Student provided with FAPE during the 2006-2007 school year?

¹ The School District contends that because it was not initially served with the due process request until August 8, 2007, this August date should be used as the significant date for the statute of limitations argument. The Hearing Officer rejects this argument. The statutory provision speaks in terms of when an impartial due process hearing has been requested. The request was made July 27, 2007 (HO-1).

5. Has the School District failed in its Child Find obligations?

FINDINGS OF FACT:

1. Student is a xx-year-old (date of birth xx/xx/xx) enrolled in the School District's High School. (P-1).

2. On July 27, 2007, Parent requested a Due Process Hearing seeking compensatory education from the 1999-2000 school year to the present for an alleged failure to identify Student as an individual with a disability and to provide Student with a Free Appropriate Public Education [hereinafter FAPE]. (HO-1).

3. Because of an erroneous identification of the LEA as the [redacted] Charter School, School District counsel did not receive the complaint until August 8, 2007. (HO-1; N.T. 19-20).

4. Both parties participated in a pre-hearing telephone conference with the Hearing Officer on September 5, 2007.

5. The Hearing Officer issued an Interim Order on October 16, 2007 denying the motion made by the School District to strike the due process request because the School District was not the LEA for all years in question and to suspend the matter because Parent has failed to participate in a meaningful fashion in the October 2, 2007 resolution session. For the reasons set forth in that Interim Order, the motion was denied. (HO-15).

6. The Hearing Officer took testimony and received documentary evidence at due process hearings on October 29 and 30, 2007.

7. The following exhibits were admitted: Hearing Officer Exhibits HO-1 through HO-15; Parent Exhibits P-A, P-1 through P-15; and School District Exhibits D-1, D-11, D-12, D-13, D-14, D-14B, D-15, D-17, D-21, D-22, D-25, and D-26. (N.T. 345-350).

8. In lieu of an additional hearing date, the parties entered into joint stipulations consisting of 27 numbered facts. The Hearing Officer has marked this document as HO-16 and incorporates these numbered stipulations into this decision in their entirety.

9. As part of HO-16, additional documents were attached and will be admitted into the record by agreement of counsel. These documents are D-3, D-4, D-6, D-8, D-9, D-10, P-16, P-17, and P-18.

10. Parent did not attend the first day of hearing on October 29 but submitted a statement through counsel indicating that she was unable to take off work on that date. She further indicated that she had no objection to the hearing proceeding in her absence. (P-A; N.T. 165).

11. Two witnesses testified at hearing: Ms. K, Special Education Director for South Region and Mother.

12. According to Mother, Student began to have difficulties in school in the fifth grade year. (N.T. 259).

13. Student attended classes within the School District until 2005-2006 when she attended a Charter School. (D-1).

14. A re-evaluation report completed April 21, 2006, while Student was in the eighth grade at the Charter School, determined that Student had a specific learning disability and that there continued to be a severe discrepancy between achievement and ability requiring special education and related services. Scores on the WISC-IV indicated a full scale intellectual functioning in the average range with subtest scores scattered from low to high average. Student's attention and concentration faltered somewhat on the Bender-Gestalt Memory Test and she was unable to complete the test at age level expectations. Reading and phonics continued to be weak but no problems in math are noted. (P-2).

15. Student left the Charter School because it only provided education through the eighth grade. (N.T. 303).

16. Student came to High School in September 2006 for the ninth grade. The record contains no precise information about exactly when Student enrolled in the School District. (N.T. 112).

17. While at the High School, Student had a school day consisting of eight periods for approximately 50 to 55 minutes per period. (N.T. 181).

18. After returning to the School District from the Charter School, no comprehensive multi-disciplinary team evaluation was performed to assess Student's educational needs. The School District chose instead to focus on a Woodcock Reading Mastery G Test. (P-10, pp. 5, 9).

19. Student failed reading at the Charter School. (D13; N.T. 301).

20. Upon Student's return to the School District, the first IEP developed for Student was November 3, 2006. (P-3).

21. This first IEP was not written in objective, measurable terms. Notably, the November 3, 2006 IEP contained the goal: “Demonstrate fluency and comprehension in reading” with an objective to read “grade-appropriate narrative and expository text with comprehension” but what was “grade appropriate” was not defined or otherwise clarified in the IEP. (P-3, p. 10).

22. The November 3, 2006 IEP failed to identify precisely what instruction would be used to address the reading deficiencies. (P-3).

23. The School District’s Director of Special Education testified that grade appropriate level for Student would be ninth grade, but at the time of last testing Student was reading only at the fourth to fifth grade level. (P-3, p. 10; N.T. 66-72).

24. The IEP resulting from the November 3, 2006 meeting showed a current level of performance in literacy at instructional level 5. All three literacy and one transition goals were extremely general: 1. “will identify and describe basic facts and ideas in text using specific strategies,” as measured by the objectives of summarizing main ideas and supporting details and retelling important facts from a text heard or read; 2. “will demonstrate fluency and comprehension in reading” as measured by grade-appropriate narrative and expository text reading with comprehension and using letter-sound knowledge to decode written language; 3. “write multi-paragraph informational pieces . . .” by writing, revising and proofreading papers of more than one paragraph and experimenting with writing various literacy forms at various grade levels. The transition goal was to “become aware of vocational strengths and begin to plan for life after high school evaluation. . .” (P-3).

25. Parent approved the placement in a NOREP signed December 4, 2006. (D-17; N.T. 190-191).

26. The School District’s Director of Special Education testified that she had no personal knowledge of Student’s IEPs. The School District called no witnesses with personal knowledge of Student’s IEPs, her behavior in school, or her reading abilities. (N.T. 39).

27. After Parent contacted the Office for Dispute Resolution (ODR) in January or February 2007, a facilitation process occurred in March 2007. (P-14; N.T. 247-250).

28. Student’s behavioral difficulties were discussed at this facilitation meeting and after instances of exclusion from school, but no Functional Behavioral Assessment was suggested nor did the School District develop a Behavioral Support Plan at any time. (N.T. 252; 265).

29. Student was issued a number of exclusions from school and requests for parental conferences for behavioral deficiencies between October 2006 and March 2007. Most of these were for disruptions and offensive language. (P-8).

30. By March 2007, Parent believed Student was struggling in school. (N.T. 251).

31. On March 28, 2007, Student allegedly chased a male student, threw a textbook at him, and kicked him. (P-9).

32. The IEP resulting from a March 29, 2007 IEP meeting contained four literacy, one behavior, and one transition goal. It referenced reading levels two or more grades below grade level. Student was to spend one class period a day in the resource room and participate in one special education English class. (P-7).

33. The March 29, 2007 IEP failed to make any reference to any of the disciplinary referrals for disruption in school, including the one occurring the day before the meeting. (P-7; N.T. 105).

34. Although the March 29, 2007 IEP is somewhat more specific in the literacy goals, the behavioral goal focused only on improving attendance and on-time behaviors. (Compare P-3 to P-7).

35. When the IEP team met on March 29, 2007, it had in its possession an independent psychoeducational evaluation identifying Student's dysthmic disorder and disruptive behavior disorder. (P-13; N.T. 240-241).

36. The November 2006 report of Dr. S, a licensed psychologist, concluded that Student needed intensive specialized reading instruction and services for her serious social-emotional problems. (P-13, pg. 6).

37. Parent sought therapy for Student with Dr. S because she was one of the therapists listed on her insurance. Student engaged in therapy with Dr. S from approximately August 2006 through June 2007, one time per week. (N.T. 287-288).

38. In or around March 2007, the School District conducted a Comprehensive Student Assistance Process Meeting (hereinafter C-SAP). (N.T. 176).

39. Student's report card shows behavioral improvement from the first marking period through the final marking period in intensive English, algebra, and intensive math. (D-26; N.T. 178-180).

40. Student showed less than average behavior in physical education during the fourth marking period. Student maintained average behavior in the resource room. (N.T. 180).

41. Student was assessed in the area of math in or around May 2007 using an assessment called Key Math. She was scoring above the twelfth grade level in mathematics. (P-1, pg. 5; D-22; N.T. 215-218).

42. The June 8, 2007 IEP contained no goals for reading comprehension and reading fluency. (P-1; N.T. 124-125).

43. In the June 8, 2007 IEP, under Student's present level of functional performance, Student is still listed as being disruptive on sixteen occasions, having left class without permission on six occasions, and having fought with another student on one occasion over a three-month time period. Behavioral difficulties included yelling, talking, cursing, and fighting with other students. (P-1, pg. 6; N.T. 57-58).

44. According to the Special Education Director for the South Region, if there are significant behavioral difficulties, the School District would do a functional assessment of behavior. (N.T. 56).

45. The only behavioral goal in June 2007 is to "improve class attendance to 90 percent each week monthly." (P-1, p. 17).

46. The June 8, 2007 IEP is internally inconsistent in that on page 7 it states that Student's attendance in core curriculum classes and inappropriate behavior impede her ability to make progress in the general education curriculum. However, page 4 states that her behavior does not impede her ability to progress and therefore no Functional Behavior Assessment or Behavior Support Plan is being developed. (P-1).

47. The IEP resulting from the meeting of June 8, 2007 contained goals in literacy: to increase vocabulary by learning five vocabulary words per week at 80% accuracy monthly, to use phonics skills to decode unfamiliar words in reading passages weekly with an 80% accuracy monthly, and to write answers to open ended questions using a writing strategy monthly with an 80% accuracy over a three-month period. The placement was "resource" with learning support, spending one class period a day in the resource room. Accommodations included extended time, directions read aloud, and a small group setting. (P-1).

48. The transition goals were for independent living and employment. (P-1).

49. In response to the June 2007 IEP, Parent signed a Notice of Recommended Educational Placement (NOREP). Parent approved of the proffered program. (D-25; N.T. 184-185).

50. Student's scores on the Woodcock Reading Mastery Tests demonstrated that Student may have regressed in word comprehension from 7.7 to 6.5 grade equivalent between November 2006 and May 2007. (P-10; P-3, p. 5; N.T. 120-122).

51. Student received tutoring in November 2007 through April 2008 on Saturdays. This was arranged through the School District. (N.T. 243-246).

CONCLUSIONS OF LAW

1. This Hearing Officer has jurisdiction over the identification, evaluation, placement or provision of FAPE to Student.

2. The School District failed in its affirmative obligation to evaluate Student's behavioral needs when it had sufficient reason to believe that Student needed a behavioral assessment.

3. The School District failed to provide FAPE for the 2006-2007 School Year.

4. The School District is entitled to a reduction of any compensatory education award for a period of two months after the beginning of the 2006-2007 school year, that being the period needed for reasonable rectification of any denial of FAPE.

5. Claims for compensatory education prior to July 27, 2005 are barred by the statute of limitations contained in IDEIA.

6. Neither of the two exceptions to the IDEIA statute of limitations is applicable in this case.

7. Claims for a remedy under Section 504 for acts prior to July 27, 2005 are barred by the statute of limitations.

DISCUSSION OF ISSUES

1. Are claims prior to July 27, 2005 barred by the statute of limitations?

The legal analysis concerns the following statutory provision:

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.

Section 1415 of the IDEIA, 20 U.S.C. §1415(f)(3)(C).

The Special Education Appeals Panel has analyzed the legislative intent behind this section and determined that if the parent fails to file for due process within two years of the first “known” or “should have known” denial of FAPE and the denial continues through subsequent years, parent may still recover compensatory education for the last two years before the due process request was filed. *In Re: The Educational Assignment of S.I.*, Special Education Opinion No. 1850 (2007).

Applying this analysis to the facts here, the “look back” period is limited to the two-year period immediately preceding the July 27, 2007 filing. Hence, recovery of any remedy for claims prior to July 27, 2005 is barred unless some exception is deemed to apply.

Parent has requested a “separate order” (N.T. 34) with respect to her claims of discrimination under Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §793 [hereinafter Section 504]. Although Section 504 does not contain a statute of limitations, the

federal courts have applied that state statute which is most analogous to the federal claim. In Pennsylvania, courts have held that a two-year statute of limitations for personal injury claims is applicable to Section 504. *Zankel v. Temple University*, 2006 U.S. Dist. LEXIS 22473; *Barclay v. Amtrak*, 343 F. Supp. 2d 429, 433 (E.D. Pa. 2004) (quoting *Saylor v. Ridge*, 989 F. Supp. 680, 686 (E.D. Pa. 1998)). The Hearing Officer specifically rejects any legal argument that a period longer than two years should be recognized to file a claim of discrimination under Section 504.

2. Does either of the exceptions to the two-year limitation period apply in this case?

The two-year statute of limitations does not apply if a parent was prevented from requesting a hearing because of misrepresentations or the withholding of information:

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

- (i) Specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

Section 1415 of the IDEIA, 20 U.S.C. §1415(f)(3)(D).

Parents contend that the October 6, 2004 IEP (P-11) misrepresented to Student's Parent that Student "has made significant progress during the past school year in all areas. . . . She

has increased her reading levels by 1-2 years (vocab + comprehension).” According to the Parent’s argument, the School District repeatedly told her that her daughter was doing well and failed to provide any test results demonstrating this progress. (N.T. 243). The issue to be decided is whether or not these statements rise to the level of misrepresentations contemplated by the exceptions to the two-year statute of limitations.

While what constitutes a “specific misrepresentation” for purposes of the statutory provision has not been defined, this phrase must mean some intentional act which is knowing and false. In order to overcome the specific limitations period, the evidence must show something more than simply professional errors or misjudgments. Measured against these standards, this Hearing Officer cannot hold that the record shows specific misrepresentations. It is not surprising that the School District would encourage Parents by stating that there was progress during the school year. This alone is not sufficient showing of a “specific misrepresentation.”

According to the Parent’s second argument, because the School District failed to conduct any relevant assessments and failed to provide accurate, objective, and measurable present levels of education, these facts constitute a withholding of necessary information. She contends that she was never told at any IEP meetings that she had the option of requesting a due process hearing and was never advised of the statute of limitations. (N.T. 335-336).

It is likely, indeed, that Parent knew nothing of the statute of limitations. Unfortunately for the Parent’s argument, the record is replete with procedural notices received by Parent which clearly contain instructions regarding the initiation of the administrative hearing process. (*See, e.g.*, P-12; HO 16, Stipulations 8, 9, 13). Given these notices, it is difficult to find that

Parent was completely ignorant of her right to request a hearing.

Parent asserts that the IEPs were deficient in providing, for example, measurable present levels of educational achievements and that these omissions rise to the level of “withholding of information.” Again, the law requires more than this. Otherwise, the exceptions would swallow up the limitations period. It is unlikely that this is what Congress intended.

Having found that neither of the specific statutory exceptions describes what occurred here, the two-year limitation period must be applied to the facts of this case.

3. Was Student provided FAPE from July 27, 2005 through the balance of the summer?

On October 26, 2004, Parent approved the program offered by the School District, including specially designed instruction. (D-9). This IEP did not provide for extended school year services for the summer of 2005. (P-11, p. 8).

The record is somewhat unclear as to when the decision was made to enroll Student at the Charter School for the 2005-2006 school year. Nevertheless, there is no evidence on which the Hearing Officer could conclude that the School District knew or should have known of programmatic deficiencies sufficient to trigger ESY for the balance of the summer of 2005. Significantly, this would encompass only the month of August 2005.

Student had not been a student in the School District for an entire year. Without question, the School District would have needed more notice to effectuate programming for the summer of 2005. Consequently, there will be no finding of a failure to provide FAPE for the

very limited part of the summer following July 27.

4. Was the Student provided with FAPE during the 2006-2007 school year?

The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.*, is the Federal Statute designed to ensure that “all children with disabilities have available to them a free appropriate public education,” (FAPE). §1400(d)(1)(A). Under IDEIA, school districts must create an “individualized education program” (IEP) for each child with a disability. 20 U.S.C. §1414(d). An appropriate program is one that is provided at no cost to the parents, is provided under the authority of the District, is individualized to meet the educational needs of the student, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. *Rowley v. Hendrick Hudson Board of Education*, 458 U.S. 176 (1982); 20 U.S.C. §1401(8). The Third Circuit Court has interpreted *Rowley* as requiring school districts to offer children with disabilities individualized education programs that provide more than a trivial or *de minimus* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180-85 (3d Cir. 1988), *cert. denied*, 188 U.S. 1030 (1989). Specifically, the Third Circuit defined a satisfactory IEP as one that provides “significant learning” and confers “meaningful benefit.” 853 F.2d at 182-184. *See also, Board of Education of East Windsor Sch. Dist. v. Diamond*, 808 F.2d 847 (3d Cir. 1986).

When a student’s behavior impedes his learning or that of others, behavioral interventions may be appropriate. 34 CFR 300.324(a)(2). Behavior support programs should include a variety of techniques permitting the student to develop and maintain skills which

address problem behaviors. 22 Pa. Code 14.133. The School District here took no real action to evaluate and identify Student's behavioral problems and to determine what actions, if any, may be necessary. The IEP Team took no specific action following receipt of the neuropsychological evaluation which surely put it on notice of a need to evaluate. Inexplicably, the School District appeared to ignore completely the myriad of behavioral incidents identified by its own teachers. (P-8, P-9). Consequently, the Hearing Officer has found that the IEP's for the 2006-2007 school year are certainly deficient in the behavioral area. A prompt evaluation should have been completed. Without an evaluation, the IEP is deficient because it failed to address documented behavioral issues.

Of equal importance, this Student demonstrated a need for reading intervention. She was significantly below grade level and the goals and objectives relating to literacy are so vague and incomplete that any measurement of progress appears impossible. The words "improve" do not assist in determining to what degree and how far Student must improve to meet these goals. The Hearing Officer must agree with Parent that the objectives are not sufficiently particularized to the goal statements and there are no baseline measures associated with these goals and objectives. The only evidence of record is that assignment to the Resource Room was not very much help, particularly if Student used the Resource Room time to roam the halls and linger in the bathroom. (N.T. 320-321).

The transition planning is quite sketchy and wholly unhelpful. Based on pertinent law, transition requires a coordinated set of activities that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated

employment, independent living, or community participation; is based on the individual student's needs, taking into account the student's preferences and interests; and includes instruction; related services; community experiences; the development of employment and other post-school adult living objectives; and, if appropriate, acquisition of daily living skills and functional vocational evaluation. *In Re: Educational Assignment of D.S.*, Special Education Opinion No. 1857 (2007). The transition plan in this case does nothing to help Student progress from her current school situation. It should have focused on her reading and behavioral difficulties.

The Hearing Officer would have welcomed any testimony in support of these IEPs, but the School District chose not to present a single witness to explain and support them. The only school district witness (called by the Parent) had no personal knowledge of Student. (N.T. 39). The only reasonable conclusion on this record is that the IEP's dated November 3, 2006, March 29 and June 8, 2007 were deficient and the implementation of those IEP's constituted a denial of FAPE for the 2006-2007 school year. These IEP's simply were not tailored to the individual needs of this Student consistent with her apparent potential. 34 CFR 300.347(a).

When a school district fails to provide FAPE, compensatory education is an available remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). The computation of compensatory education should be from the time the school district "knew or should have known of [the] programmatic deficiency." *M. C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1999). Further, a school district is entitled to a reduction of the compensatory education award for a period of reasonable rectification. *Id.*; *See also, In Re L.C. and the Philadelphia School District*, Special Education Opinion No. 1809 (2007). The

purpose is to design compensatory education to replace that which was denied and to make the child “whole.” *See B.C. v. Penn Manor Sch. Dist.*, 805 A.2d 642 (Pa. Commw. 2006).

Two months after the beginning of the school year is sufficient time within which the School District could have performed the necessary evaluations and rectified any denial of FAPE by implementing a more complete and reasoned IEP. After Student returned to the School District, a proper evaluation, especially of Student’s reading abilities, should have been made to determine appropriate programs and placement for this Student. At least by November 1, an appropriate IEP should have been in place. Consequently, compensatory education will be awarded from November 1, 2006 through the present.

At least two hours per day should have been used to assist Student in her reading difficulties and to address her behavioral needs. The School District assigned one hour to the resource room; an additional hour should be sufficient to make Student “whole.” However, as discussed, Student’s recovery of compensatory education is limited by the applicable statute of limitations and a reasonable rectification period.

In addition, the School District will be ordered to perform any necessary evaluations.

5. Has the School District failed in its Child Find obligations?

The Court in *Veschi v. Northwestern Lehigh School District*, 772 A.2d 469 (Pa. Cmwlth 2001), held that the primary responsibility for identifying exceptional children and developing educational programs to meet their needs rests with the local school district. Here, Parent contends that the School District failed in its initial obligation to commence an

evaluation when Student failed second grade in 1999. This is well outside the period over which this Hearing Officer has jurisdiction.

Parent further argues that the School District continued to neglect its obligation to evaluate this student's learning disabilities and to address them. The Hearing Officer does agree that a current evaluation is warranted and it will be ordered. No other remedy is appropriate.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. Within thirty (30) calendar days of the receipt of this Order, the School District must complete, at School District expense, a comprehensive and in-depth reevaluation report considering both Student's behavioral needs as well as her need to improve reading skills.
2. Within fifteen (15) calendar days of the receipt of the reevaluation report, Student's IEP team must convene for the purpose of developing the Student's specific program, services, and placement based upon Student's needs.
3. Because of the denial of FAPE from November 1, 2006 through the present, Student is entitled to compensatory education at the rate of two hours per day multiplied by the number of school days that Student attended school between November 1, 2006 and the date that an appropriate IEP is in place.
4. Student shall be assumed to have attended school unless the School District has documentation of absences on specific days.

5. Student's Parent shall decide how the compensatory education hours should be spent so long as they take the form of appropriate developmental, remedial, or enriching instruction or counseling that furthers the Student's needs and furthers the goals of the Student's future IEP's.

Date: January 17, 2008

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