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JK
Child's Name

Xx/xx/xx
Date of Birth

8130-07-08
(Remand of 5133/04-05KK)
ODR File Number

May 5, 2005; June 7, 2005
Dates of Hearing

(Record Closed June 17, 2005)

Closed Hearing

Parties to Hearing

Parents
Mr. and Mrs.

Date Transcripts Received:
May 18, 2005
June 13, 2005

Parent Representative
David Painter, Esq.
McAndrews Law Office
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Date of Decision:
June 23, 2005

School District
Director of Pupil Services
Marple Newtown School District
26 Media Line Rd.
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Kenneth Rose
Hearing Officer

District Representative
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Background

The student is an xx-year old child residing in the Marple Newtown School District. She is identified as having a learning disability and is assigned to a part time learning support class.

Stipulations

1. The student's date of birth is xx/xx/xx.
2. The student is a resident of the Marple Newtown School District.
3. The student is an eligible student with a specific learning disability in the area of reading.

Findings of Fact

1. The parents became concerned in kindergarten when a sibling one year younger was reading better than the student. They provided weekly tutoring to help.

In second grade the parents requested an evaluation. (N.T. 294, 295, 296, 301; S-2)

2. In second grade the student was evaluated. The Evaluation Report (ER) found her to have a specific learning disability in reading and spelling. On the Wechsler Intelligence Scale for Children-Third Edition (WISC III) she was found to be above average IQ in verbal and nonverbal areas. Discrepancies were found in reading, decoding and spelling areas on Wechsler Individual Achievement Test-Second Edition (WIAT II). Perceptual abilities were found to be normal. Encoding was found to be weak.

The ER contained information from the parents, classroom observations, teacher input and a variety of evaluation instruments.

It was felt that the student could be accommodated in the regular education program. (N.T. 46; S-4)

3. The parents agreed with the ER of January 25, 2002. (N.T. 300, 329; S-4, S-5)
4. The third grade teacher felt the student's needs were being met through the regular education interventions. (N.T. 221)
5. The parents had the student evaluated privately in October 2003 (Grade 4). The evaluation found the student to be of average intelligence. She was found to have

Developmental Reading Disorder. Reading tutoring was recommended twice a week. The results were given to the school district. (N.T. 301, 302; S-6)

6. The parents were aware of the student's progress in Title I and other regular education interventions. (N.T. 341)

7. Both the parents and the regular education fourth grade teacher expressed concerns about the student's progress early in grade four. In fourth grade the student had reading difficulties that regular education accommodations were not correcting. Her difficulties were in the areas of phonics, comprehension and spelling. Time to complete homework was an issue. (N.T. 206, 215)

8. By way of a Notice of Recommended Educational Placement (NOREP) the parents accepted the Individualized Education Program (IEP) of December 18, 2003 (N.T. 329; S-7)

9. The parents were told at IEP meetings that the Wilson Reading Program would be used for phonics. (N.T. 330)

10. In grade four, under the December 18, 2003 IEP, the student's comprehension and phonetic analysis needs for fourth grade were addressed in a part time learning support class for one and a half hours a day. Sometimes the student met with the learning support teacher for writing. The group used the Harcourt-Brace (HBJ) reading program and the Wilson reading Program. The group was three students. (N.T. 48-51; S-7)

11. The fourth grade teacher and the learning support teacher consulted. (N.T. 212)

12. At the end of fourth grade the student's grades were A's and B's with a C+ in writing. In addition to learning support, the student received extra help in mathematics. (N.T. 209-211; S-17)

13. The student did not reach her reading and decoding goals on the December 18, 2003 IEP to go from beginning fourth grade to end of fourth grade reading level. (N.T. 95, 96; S-7, S-11)

14. In the fall of 2004 (grade five) the student's score on the Woodcock Johnson reading test was 4.1. (S-21)

15. TERRA NOVA reading scores increased between grades two and four. The fourth grade scores for comprehension and vocabulary were 86% ile and 68% ile respectively. The fourth grade testing provided extended time. (N.T. 163; S-18)

16. On November 3, 2004 the district requested permission to conduct a routine reevaluation. The parents did not immediately give consent because they had just had the

student privately evaluated. They eventually gave permission. (N.T. 53, 54; S-8, S-9, S-10)

17. The Kaufman Test of Educational Achievement (KTEA) administered December 20, 2004 indicated reading levels of 3.1 to 3.5. (N.T. 173; S-10)

18. The student's IEP was revised December 22, 2004. Her reading level was placed instructionally at grade four, comprehension was pre-proficient, spelling was below grade level and frustration was noted in mathematics. Science and social studies were at "A" level. On the KTEA II, pronunciation was 3.1, comprehension 3.5; math scores were 6.8 to 4.7. Her Developmental Reading Assessment (DRA) score was of fourth grade level. (N.T. 55, 56, 57, 58-61; S-10, S-11)

19. The IEP developed December 22, 2004 listed her reading level First Quarter of fourth grade (Grade B-), but indicated need for improvement in comprehension and phonetic analysis. Her DRA was on a third grade reading level. Goals and objectives were developed for decoding skills, phonetic analysis and identifying sound and letter variants. An array of program modifications and specially designed instructions (SDI) were developed.

The student was placed in a part time learning support class. (N.T. 332, S-7, S-11)

20. By way of a NOREP the parents approved the IEP of December 22, 2004. (S-11)

21. In the student's regular classroom, she received accommodations of extra time, reading aloud and small group testing. (N.T. 56, 57)

22. The student had a private reading tutor who has worked with the student from May 14, 2004 to April 25, 2005. She worked with the student once a week for forty-five minutes to one hour during the school year and twice a week during the summer. During the summer the Wilson Reading Program was followed. During the school year work on reading comprehension, fluency and literature was done.

The private reading tutor is certified to teach the Wilson Reading Program. The Wilson Reading Program concentrates on decoding and encoding words. It is a structured program. (N.T. 252, 253, 254)

23. The student is progressing at an average rate in the Wilson Reading program. Her progress is not hindered by others in her reading group. (N.T. 67, 68, 69, 71, 72, 113; S-21)

24. The Wilson Reading Program, when done in a school setting, is designed to be done two or three sessions a week. Moving from one step to the next by a student is a subjective decision by the Wilson teacher. (N.T. 167, 168, 262, 287)

25. Sometimes school events or early dismissals caused a Wilson reading lesson to be shortened or skipped. On some days there were multiple Wilson lessons given at school. (N.T. 102, 103, 285; S-21)

26. In fifth grade the amount of time in the Wilson Reading Program was increased to about forty-five minutes two or three times a week. The group for reading was two students. (N.T. 51)

27. The student's learning support teacher has level one Wilson training. (N.T. 82)

28. The school provided the Wilson level at which the private tutor should start. At the end of the summer the tutor provided the school with the student's current Wilson level. (N.T. 306, 307)

29. The school district's reading consultant has consulted with the learning support teacher and the parents. (N.T. 167)

30. The parents were concerned early in fifth grade about the student's math progress. She got A's on tests, but the homework was too long for her to complete. In prior years teachers were more flexible if homework didn't get finished. The IEP was revised February 7, 2005 to place her in Resource Room for math. The math program was adjusted again at a later date. (N.T. 141-148, 150, 153, 315-319, 342, 343; S-12, S-26)

31. Accommodations were made for reading skills needed on math assessments. (N.T. 120)

32. The student's social studies tests are taken with accommodations with the learning support teacher. The learning support teacher or her instructional assistant came into the social studies class on a regular basis to assist the student. (N.T. 239, 244)

33. In September 2004 the student was reading mid-third grade to fourth grade. (N.T. 73; S-21)

34. On April 4, 2005 an IEP meeting was held to revise the IEP of December 22, 2004. An SDI was added that the student was to be placed in a homogeneous group and that fluency would be monitored by leveled passages. (N.T. 80; S-25)

35. The student receives social studies in a regular education fifth grade class. The regular education teacher consults regularly with the learning support teacher. The social studies text is read aloud by the teacher to all students. Her grade is between a B and A. (N.T. 237, 240-245)

36. The school district's reading program is Harcourt-Brace (HBJ). It is researched based, has an intervention piece and supplemental materials. Phonics is embedded. (N.T. 94, 134, 177, 178)

37. The school did not start Wilson in the 2004-2005 school year until October 18, 2005. After that date Wilson lessons were often canceled or shortened for a variety of reasons. (N.T. 133, 300, 308-311; S-19, S-20)

38. There are discrepancies as to what dates Wilson instruction occurred at school. (N.T. 285, 286; S-19, S-21)

39. The Wilson Assessment of Decoding and Encoding (WADE) can be used to show growth in the Wilson Program. Between January of 2004 and October 2005, the student's score on the WADE declined in Total Words and Total Spelling. There was an increase in Total Sounds.

There was an eight to ten week gap between the end of the private summer Wilson instruction and the October 2004 WADE. (N.T. 269, 273, 274, 275, 283; S-22)

40. The private tutor opines the group instruction using Wilson should be in homogeneous groups of no more than five or six students. There should be three to five sessions a week for forty-five minutes to an hour. She further opines that one thirty minute lesson every other day is not adequate. (N.T. 257, 258, 267, 268)

41. The student's learning support teacher opines that the student's discrepancy of ability to reading level is correctable with appropriate instruction. (N.T. 107, 108)

42. The reading specialist opines that the student is making progress on closing the gap between ability and reading level over time in the current program. (N.T. 200, 201)

43. The student's progress report of April 14, 2005 shows that the student is "making progress" or "satisfactory" in all goals and objectives of her IEP except fractions, which have not yet been taught in isolation. When determining the student's progress on IEP goals and objectives, many things are used. (N.T. 128-130; P-2)

44. The student's writing skills are on grade level, but still need work in some areas. Her oral expressive skills are higher than her writing skills. (N.T. 79, 122, 123; S-28)

Issues

1. Was appropriate "Child Find" used?
2. Is the proposed IEP appropriate?

3. Were previous IEPs appropriate?

Remedies

1. Are the parents due reimbursement for the Independent Educational Evaluation (IEE)?
2. Are the parents due reimbursement for tutoring?
3. Is the student due compensatory education?

Discussion and Conclusions of Law

The student was first evaluated in second grade. She was found eligible for special education, but not in need of specially designed instruction. The school district provided regular education interventions to address her needs. The parents agreed with this. By fourth grade both the school and the parents were concerned about the student's progress. The parents did not request another evaluation by the school district, but chose to have an IEE performed.

The IEE found the student to have a Developmental Reading Disorder and recommended reading tutoring twice a week. An IEP team meeting was held and an IEP was developed. The parents approved the IEP and placement. The student's present level in reading was stated as third grade using the DRA. The reading goal on the IEP was stated as improve decoding from beginning fourth grade to end of fourth grade with at least eighty-five percent accuracy. Under SDI's the student was to receive direct phonics instruction five times a week. This was to be done by using the Wilson Reading program and Harcourt-Brace program. Accommodations were made across her programs. The parents approved the IEP and placement. The parents provided private tutoring.

The student's IEP was revised December 22, 2004 on its anniversary date. Reading levels varied by instrument used. The KTEA was grade level 3.1 for reading pronunciation and grade level 3.5 for reading comprehension; the DRA was fourth grade level; and instructionally it was at the fourth grade level. The SDI for phonics was stated as phonics based multi-sensory sequential reading program 2-3 times a week. The parents approved the IEP and placement.

When concerns were raised by the parents about the student's math progress, the IEP was revised. Later program adjustments were made in math. The Wilson Reading Program done at school and home were done by certified Wilson instructors.

The student is progressing at an average rate in the Wilson Reading Program. The program did not start until the fifth or sixth week of school in fifth grade. During the course of fifth grade sessions were sometimes skipped, but multiple sessions were held

on other days. Report card grades are A's and B's. Reports on IEP goal attainment state progress is being made.

The Hearing Officer ruled that Montour applies. In Montour School District v. S.T., 805 A.2d at 40, the Commonwealth Court of Pennsylvania held that the limitation period set forth in Bernardsville, a tuition reimbursement action, was applicable to claims for compensatory education. The Montour Court decided that: "...initiation of a request for a due process hearing must occur within one year, or two years at the outside (if the mitigating circumstances show that the equities in the case warrant such a delay), of the date upon which a parent accepts a proposed IEP." The last IEP accepted by the parents was December 22, 2004. It was partially revised February 7, 2005.

1. Was appropriate "Child Find" used?

The question of appropriate "Child Find" goes beyond the time of review under Montour. During the time of review of this due process hearing the school district met its duty under 34 CFR §300.300 (a 2,3). IEP revisions were made as needs changed as required by 34 CFR § 300.342 (c1,2).

2. Is the proposed IEP appropriate? and 3. Were previous IEP's appropriate?

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."

A preponderance of the evidence shows the two IEPs (December 18, 2003 and December 22, 2004) were developed in accordance with 34 CFR §300.340-347 and 22 PA Code §14.131 (1)(2) and met the identified needs of the student.

The claim by the parents for reimbursement for the IEE fails on the grounds of timeliness of putting forth the claim. See the description of Montour referenced above. Even if Montour did not apply, the parents' claim would fail. Under 34 CFR §300.502(b), the parents' entitlement to reimbursement must have a disagreement with the school district's evaluation. The parents did not express such an objection nor did they request a reevaluation.

Requests for compensatory education and/or tuition reimbursement in this case hinge on whether meaningful education progress or benefit was occurring. Rowley, Rose, Diamond and Polk are cited above. This is often a difficult determination. Certainly meaningful means more than trivial, but certainly not maximum. A preponderance of the evidence shows progress that can be called meaningful even if it falls short of fully reaching the IEP goal or parent/teacher expectation.

When considering the parents' request for compensatory education, the failure of the school district to implement the Wilson Reading Program at the start of the school year must be noted. Compensatory education is an in-kind remedy. A child is entitled to compensatory educational services if the child is exceptional and in need of special education and related services (i.e., eligible for a free and appropriate public education (FAPE)) and if through some action or inaction of the district, the child was denied FAPE. See Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), In Re the Educational Placement of J. A., Opinion Number 1238 Compensatory education's specific purpose is to remedy a period lacking such benefit computed from when the district knew or should have known of the programmatic deficiency. See M.C. v. Central Regional School District 81 F. 3rd 389 (3rd Cir. 1996) Thus, services must be over and above what is required for FAPE now and in the future.

The school district did not provide the Wilson Reading Program, understood by the parents and the school district to be two to three times per week, for a period from the beginning of the school year to October 18, 2004. Allowing for a few days for start up time for getting the school year programs up and running, the time of lack of Wilson sessions is calculated as five weeks at a session every other day or thirteen forty-five minute sessions.

The LEA is ordered to take the following action

1. Provide the student with compensatory education equivalent to five hundred and eighty-five minutes (nine hours and forty five minutes) of educational service that meets needs addressed in the December 18, 2004 IEP. The compensatory education will be determined in cooperation with the school district, but the parents will be the final determiner.

Date _____

Kenneth Rose, Hearing Officer