

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

Due Process Hearing

Student (#8679/07-08 AS)
Date of Birth: xx/xx/xx
Date of Hearing: May 29, August 4, 28, and
September 10, 2008
Closed Hearing

Parties to the Hearing

Parent

Representative
Pamela E. Berger, Esq.

Transcript Completed
September 16, 2008

Date of Decision
October 6, 2008

School District
Woodland Hills

Representative
Barbara A. Rizzo, Esq.

Hearing Officer
David Y. K. Lee

II. BACKGROUND

Student is a teen-aged student in the Woodland Hills School District (hereafter District). Student was an eighth grade eligible student during the 2007-2008 school year at the West Junior High School (hereafter West) receiving Learning Support (hereafter LS) services. The parent asserted that Student was denied a Free Appropriate Public Education (hereafter FAPE) for the 2006-2007 and 2007-2008 school years due to inappropriate Individualized Education Plans (hereafter IEPs) as well as peer-on-peer harassment. The District conceded that the 2007-2008 was inadequate¹ but denied the harassment charges and the inadequacy of the 2006-2007 IEP.

III. FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a student in the District. (P. #10.)
2. Student re-enrolled as a seventh grade student in the District after attending the [redacted parochial] Elementary School (hereafter parochial school) where Student was determined to need Speech and Language Support (hereafter S/L). (N.T. 103, 307, 471. P. #11.)
3. After re-enrollment in the District, S/L was continued where the content of S/L was essentially extra instruction in Reading provided by the S/L teacher in a small instructional setting. (N.T. 317-318, 322, 335-336. P. #11 @ 5 & 6.)

¹ The parties, however, could not arrive at an agreement regarding the amount of compensatory education owed to Student for the 2007-2008 school year. (N.T. 169.)

4. An Evaluation Report (hereafter ER), dated February 14, 2006, showed a Test Composite of 70 on the Stanford-Binet Intelligence Scale (hereafter Stanford-Binet). (N.T. 104. P. #6 @ 6.)

5. Standard scores from the Wechsler Individual Achievement Test-Second Edition (hereafter WIAT) ranged from 51 for Math Reasoning to 100 for Spelling. (P. #6 @ 6.)

6. The ER concluded that Student was in need of LS in Math as well as S/L. (N.T. 342-343. P. #6 @ 9.)

7. Student's seventh grade IEP, dated September 14, 2006, consisted of three goals in Math, and two goals in S/L. (N.T. 343, 312-314, 318-319, 379-381. P. #11 @ 5-9.)

8. The IEP reported the standard scores from the ER but did not provide operational instruction levels. (N.T. 311-312, 380-381, 424. P. #11 @ 4.)

9. On March 21, 2007, LS Reading and English goals were added to Student's IEP. (N.T. 343-344, 346-350, 468-470. P. #11 @ 1, 10-14.)

10. With the addition, however, the section on "present levels of academic achievement" of the IEP was not changed. (P. #11 @ 4.)

11. The IEP was revised on October 3, 2007, when Student was in eighth grade, although the end-point of Student seventh grade IEP was September 13, 2007. (P. #10 @ 1, & P. #11 @ 1.)

12. The District conceded that the 2007-2008 IEP was inadequate and the parties deferred to this Hearing Officer with regard to the amount of compensatory education owed by the District. (N.T. 169, 426.)

13. During the 2007-2008 eighth grade year, there were incidents involving Student and Student's peers as well as being referenced in a message on My Space, an Internet site. (N.T. 55, 60-61, 80-82, 110-111, 120-133, 159-161, 273-282, 291-298, 499-500. P. #1 - #5. S.D. #2 - #6.)

14. While not specifically in response to the parent's concerns regarding harassment, the District had in place an anti-bullying program during Student's seventh and eighth grade years,. (N.T. 415-419, 453-456. S.D. #10.)

15. Various District personnel, with the responsibility of student discipline, responded to the incidents involving Student accordingly. (N.T. 39-55, 271-288, 471-487.)

16. Due Process Hearing sessions were held on May 29, August 4, August 28, and September 10, 2008.²

IV. ISSUES

1. Was Student denied a FAPE during the 2006-2007 school year? (N.T. 166.)
2. Was Student unduly subjected to peer-on-peer harassment, under Ch. 15/Sec.504, during the 2006-2007 and 2007-2008 school years? (N.T. 168.)
3. Is Student entitled to compensatory education? (N.T. 171.)

V. DISCUSSION AND CONCLUSIONS OF LAW

² The lengthy intervals of these proceedings were results of attempts to settle between the parties as well as availability of witnesses over the summer months. (N.T. 4, 162, 166, 264, 374.) Written Closing Statements were received by this Hearing Officer on September 23, 2008. (N.T. 500.)

34 CFR §300.320(a) states “...the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 300.320 through 300.324, and that must include—(1) A statement of the child’s present levels of academic achievement and functional performance...(2)(i) A statement of measurable annual goals, including academic and functional goals...”.

Seventh grade Math goals

Student returned to the District from parochial school as a seventh grade student with an ER which recommended LS services. It was then decided, with the participation of the parent, that Student would receive LS in Math as well as S/L but would remain in regular English and Reading. Student progress in English and Reading was to be monitored. (N.T. 342-343.)

Student’s seventh grade IEP developed by the District lacked meaningful information under “present levels of educational performance” that was operational in an instructional setting. (P. #11 @ 4.) The determination of need for LS in Math was based on the ER completed when Student was enrolled in parochial school. (P. #6.) Under “present levels”, the IEP included the standardized scores from the Stanford-Binet and the WIAT. (P. #11 @ 4.) There was no clarification or elaboration of what Math skills Student was able, or not able, to do. Since standard scores do not in themselves translate to an operational understanding of Student’s Math computation or application deficits, it is therefore not unexpected that the subsequent three Math annual goals were generalized statements with little, if any, connection to Student’s specific instructional needs.

Annual goals were written that Student “will improve math computation skills by increasing digits correct per minute by 1 digit every 3 weeks [in all operations]”, “will improve measurement skills by correctly measuring to the nearest 16th of an inch, tell time to the minute and count/compare change”, “will improve understanding of solving word problems by first identifying the key words to help solve and then solving 8 out of 10 single to multi-step word problems”. (P. #11 @ 7-9.) It is reasonable to expect all students to improve over time in varying degrees. In order to measure improvement in Student’s hierarchical Math skills, the classroom teacher testified that probes were used after [emphasis added] she wrote the goals and had Student in class. (N.T. 380, 424.) This is a backward process which gave rise to a confusing picture of Student. If Student “did not know how to measure at all then” (N.T. 424.) as a seventh grade student, the goals of measuring to the nearest 16th of an inch and solving multi-step word problems in all operations are indeed questionable in their appropriateness. The backward process also indicates an erroneous understanding of the purpose of an IEP.

The ER, in the least, identified “poor accuracy on basic problems involving subtraction, and multiplication facts”, “significant difficulty in understanding and solving basic word problems involving addition and subtraction”. (P. #6 @ 7.) If those were some kind of baselines for instruction at the beginning of seventh grade, it is indeed a stretch to make the connection between them and the IEP goals of understanding fractions in measurement and solving multi-step word problems in all [emphasis added] operations. It is therefore determined that Student was denied a FAPE in Math for 2006-2007 due to a faulty IEP.

Even though the parent’s claim of the inappropriateness of Student’s eighth grade IEP is not before this Hearing Officer in that the District has so conceded, this Hearing Officer notes the lack of continuity between Student’s seventh grade and eighth grade Math goals. (N.T. 426. P. #10 @ 9-12.) In chronologically consecutive IEPs, the ending points of an IEP should logically provide the baselines for the subsequent one.

Seventh grade Reading and English goals

When LS Reading and English goals were added to the IEP toward the latter part of seventh grade on March 21, 2007, updated present levels were not given even though Student's progress was monitored in Student's regular Reading and English classes. (N.T. 343. P. #11 @ 4.) The monitoring in Reading and English should be the basis for the recommendation of adding LS in those two subjects. Baseline data, therefore, would be expected to support the recommendation. Lacking such and for the same reasons as determined with regard to the Math goals, the Reading and English goals were similarly faulty. The special education teacher responsible for the development of the IEP testified to the use of a new curriculum for all students in the District, and gave a comprehensive description of the English instruction provided for the short time Student was in LS English during seventh grade. (N.T. 341-342, 346-351.) The LS English might, indeed, have been a "model class" and Student might have made meaningful progress. (N.T. 358.) The adequacy of an IEP, however, is determined when it was developed and not in retrospect.³ With regard to LS Reading, it was confusing even as to whether or not the LS Reading teacher had Student as a student in seventh grade. (N.T. 429, 431.) Nevertheless, in the absence of meaningful instructional data identifiable in the IEP for English and Reading, the goals were generalized and difficult to measure in order to determine meaningful progress.⁴ (N.T. 352-355.) Thus, Student was denied a FAPE in English and Reading for the approximately two months in seventh grade.

³ Fuhrman v. East Hanover Bd. Of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993).

⁴ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

In dicta, the District needs to be cognizant of the disconnect in the dates between one IEP and the next. (F.F. #11.) Although it does not affect the outcome of the instant matter, there should not be a gap of around three weeks between Student's seventh and eighth grade IEPs. The disconnect in time perhaps also contributed to the disconnect in instructional goals.

S/L goals

The District is advised to assess its practice of having a separate "present levels" page for S/L in the IEP. (P. #11 @ 22.) Not only does it cause confusion even to the S/L therapist herself, it also gives the impression of the IEP team not working together on the needs of Student. (N.T. 305-306, 316.)

The S/L therapist testified to Student's need for S/L based on the scores from the Test of Oral and Written Language Skills (hereafter OWLS) and the S/L goals were to strengthen Student's language/vocabulary comprehension by supplementing the classroom reading material. (N.T. 311-315, 327-332. P. #11 @ 5 & 6.)

Q. It sounds as if you were doing one-to-one reading instruction.
Am I missing something?

A. Reading is language, so it is – it is reading, it is language.
Reading is language. I tried to use the reading curriculum
to help Student with Student's weakness in language skills.

(N.T. 317-318.)

Q. Aside from the fact that you were trained as a speech and
language clinician...how was what you did with Student
different from a Language Arts teacher...?

A. Basically, the difference is that, being on a smaller scale
with one child or even a group of three children, their
responses are much more frequent. I can get Student to answer
much more often than the classroom teacher.

(N.T. 336.)

Although the provision of S/L in the form of supplemental reading in a small group or one-to-one setting is not generally expected, Student's eligibility for S/L was not an issue or challenged. Since the relationship, if any, between Student's score of 70 on the Stanford-Binet and the Listening Comprehension score of 74 on the OWLS was not explored (N.T. 308-309, 322. P. #11 @ 22.), and the parent did not provide substantiating testimony regarding S/L of a different nature, the S/L portion of Student's seventh and eighth grade IEPs will not be disturbed by this Hearing Officer.

Peer-on-peer harassment

Notwithstanding other provisions of this chapter, an eligible or noneligible student under Chapter 14 (relating to special education services and programs) may use the procedures for requesting assistance under §15.8(a) (relating to procedural safeguards) to raise claims regarding denial of access, equal treatment or discrimination based on handicap. A student filing a claim of discrimination need not exhaust the procedures in this chapter prior to initiating a court action under Section 504.

22 PA Code §15.10

In supporting the claim of harassment under Ch. 15/Sec. 504, the parent related incidents involving primarily two students with whom Student had contact during Student's seventh and eighth grade years. (N.T. 110-111, 115-117, 160-161.) The chronology of the incidents and the number of individuals involved tended to be confusing as they were from recall by the parent and the District personnel. The analysis by this Hearing Officer will be based upon a synthesis of the documents and testimony, regarding the incidents of concern, starting from Student's seventh grade year.

Over the two years in question, there were changes of principals at West. Ms. M, who was the principal for the majority of Student's seventh grade year, testified to her recollection of Student's involvement with another student. (N.T. 473-481, 486.) Ms. M testified to her handling of the situation between Student and the other student. The parent had actually forgotten about the matter until it was brought up during Ms. M's testimony. (N.T. 495.) There was no dispute regarding the occurrence or resolution on record between Student and the other student.

The seventh grade principal changed from Ms. M to Mr. M toward the end of Student's seventh grade year. (N.T. 38, 486.) Mr. M, however, did not become especially aware of Student until October of the eighth grade year. (N.T. 38-39.) The incidents brought forth by the parent during Mr. M's tenure as principal centered around October and November of 2007. After sorting through the somewhat confusing testimony with regard to chronology, it is ascertained by this Hearing Officer that the incidents primarily involved Student and two other students (hereafter student A and student B) although the dates of the incidents may not be exact. (N.T. 88-89.) Student A was one who was involved in a physical contact with Student, in early October, resulting in the police being notified by the parent. (N.T. 42-43, 49-51, 55, 120-121. P. #1.) The same Student A was referenced toward the end of November with regard to threats of physical harm to Student. (N.T. 82-86. P. #2. S.D. #5.) It appears that there was a continuing sequence of verbal exchanges between Student and Student A in November. (N.T. 76-78. S.D. #3.) Student B was a student who was involved in posting a threatening message on My Space. (N.T. 56-62, 124-125. P. #3 & P. #4.) The District did not dispute that these events occurred. Mr. M testified, from limited recall (N.T. 62.), to the various steps taken when he was made aware of the incidents such as distributing memos to the security officers and teachers (N.T. 7, 40-44, 96-97.), gathering information from the students involved and discerning witnesses (N.T. 47-49, 63-67, 74-77, 78-81.), altering class schedules (N.T. 69-70.). This Hearing Officer notes that the District had an anti-bullying program in place during the two years in question. (F.F. #14.) The dissatisfaction of the parent with the response of the District to her concerns regarding Student being harassed or bullied was clearly the impetus of

these proceedings.⁵ (N.T. 113, 116, 126-130, 134, 141. P. #5.) Whereas the parent bears the burden of proof in the contention of harassment,⁶ testimony is not unequivocal that the District was negligent regarding the parent's concerns. The facts in evidence, therefore, are not sufficient to suggest that Student was denied a FAPE specifically because Student was denied access, equal treatment, or was discriminated against, due to Student handicap under Ch. 15.

⁵ Notwithstanding the parent's lawsuit against the security company which provides security personnel in the school building. (N.T. 22.)

⁶ Schafer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 (2005).

Compensatory education

Compensatory education is a remedy designed to provide eligible students the services they should have received pursuant to a FAPE. Lester v. Gilhood, 916 F.2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991). Compensatory education is an in-kind remedy. By providing additional future educational services, a student can be compensated for past denial of due process rights or educational programming that he should have received. Compensatory education should accrue from the point the District knew or should know of the IEP's failure, but excluding time to reasonably rectify the problem. M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996).

An award of compensatory education is warranted based on the faulty IEPs for Student's seventh and eighth grade years. There is no time subtracted in the calculus for the District to rectify the problem since instructional information was available for the development of an IEP. The usual time period factored in for the completion of an ER is not needed in this instance.

Student received LS Math for both years. Student had LS Reading and LS English in eighth grade and for a little over two months in seventh grade. Student was therefore denied a FAPE for three class periods (English, Reading, Math) in eighth grade, one class period (Math) in seventh grade plus two class periods (English, Reading) for one-fifth of seventh grade. Given 180 days in a school year, Student was therefore denied a FAPE for $\{(3 \times 180) + 180 + (2 \times 36)\} = 792$ class periods over the two school years in question. Although the seventh grade IEP did not start from the first day of the school year and there was a gap between the seventh and eighth grade IEPs, an exact counting of days is not conducted pursuant to B.C. v. Penn Manor.⁷ There were approximating 800 class periods and 45 minutes of instruction per class period.⁸ The amount of compensatory education “reasonably calculated to bring [Student] to the position that [Student] would have occupied but for the school district’s failure to provide a FAPE” is hereby determined to be 600 hours of direct instruction. The compensatory education award may be in the form of extra tutoring after school, on weekends, and/or during school breaks. The parties may agree to purchase educational services in an amount not to exceed the average cost to the District for a special education teacher’s salary plus benefits for the same number of hours.

Therefore, it is hereby ordered:

VI. ORDER

The LEA is ordered to take the following actions:

⁷ B.C. v. Penn Manor, 906 A.2d 642 (Pa. Commonw. 2006).

⁸ *Id.* rejects the strict hour-for-hour standard for calculating compensatory awards.

The District is to provide Student with 600 hours of compensatory education consistent with the Discussion above.

October 6, 2008

Date

David Y. K. Lee

David Y. K. Lee
Hearing Officer