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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: NM

Date of Birth: XX/XX/XX

Date of Hearings:
November 17, 2008, January 13, 2009, January 23, 2009

CLOSED HEARING

ODR Case # 9166-08-09-KE

Parties to the Hearing:

Ms.

Ms. Lee Carr
Scranton School District
425 N. Washington Avenue
Scranton, PA 18503-1305

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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February 9, 2009

February 23, 2009

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an elementary school aged student residing in the Scranton School District (“District”) who has been identified as a child with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)¹ and Chapter 14 of the Pennsylvania education regulations (“Chapter 14”)². The student’s grandparent claims that the District failed in its obligations to identify the student’s disability and to provide special education programming.

For the reasons set forth below, I find in favor of the grandparent.

ISSUES

Did the District fail in its obligations to identify Student as a student with a disability in need of special education?

If so, is the student entitled to an award of compensatory education?

Is the grandparent entitled to reimbursement for an independent education evaluation obtained by her?

FINDINGS OF FACT

1. Student was born on xx/xx/xx.

¹ It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818.

² 22 PA Code §§14.101-14.163.

2. Student has been identified by the District as a student with specific learning disabilities in reading and written expression. (Grandparent's Exhibit³ ["P"]-19; School District Exhibit ["S"]-9).
3. In the 2006-2007 school year, Student entered the District in 1st grade after attending a private kindergarten. (Notes of Testimony ["NT"] at 23-24).
4. In November 2006, around the end of the first marking period, Student's 1st grade teacher noticed that the student was having difficulties in reading and spelling. The teacher shared those concerns with Student's grandmother. In the ensuing weeks, the teacher utilized strategies to enhance Student's instruction in reading and language arts. (NT at 308-311).
5. In January 2007, the persistence of the difficulties in reading led the teacher to consult with the District's special education "diagnostic teacher". (NT at 140-141).
6. The District's procedures for handling referrals for students with suspected disabilities is for a classroom teacher to consult with the building principal and the diagnostic teacher, who is responsible for gathering paperwork and initiating contact with the student's parents to begin the evaluation process. (NT at 139-140).
7. On February 2, 2007, Student's teacher filled out and turned in to the diagnostic teacher a form entitled Request for Individual Educational Evaluation. The form was signed by the teacher and the building principal. (P-1).
8. In the Request for Individual Educational Evaluation, the teacher indicated that the student was receiving remedial services in reading. In the section entitled "specific reason for evaluation", the teacher wrote: "Student is functioning well below grade level. Student has really fallen much further behind midway through the 2nd quarter. Student has great difficulty with letter-sound rec., phonemic awareness, rhyming words, oral fluency, sight words, and comprehension." (P-1 at page 1).
9. In the section addressing measures already undertaken, the teacher wrote: "Student receives repeated instructions, 1 on 1 help, peer partner, hands-on material, manipulatives and repeated testing." (P-1 at page 1).

³ While the evidence on behalf of the student is entered by the student's grandmother, the customary "P" to mark grandparent's exhibits will be used in this decision.

10. On a checklist of “persistent characteristics” on the Request for Individual Educational Evaluation, the teacher has indicated that the student was two or more years below grade level, a comment which she expanded on in testimony as pertaining to Student’s reading. (P-1 at page 2; NT at 314).
11. On February 11, 2007, the diagnostic teacher spoke with the building principal. The diagnostic teacher was going to monitor Student and to wait for the results of Terra Nova and Otis-Lennon testing scheduled to take place in the District in March 2007. (NT at 159, 206).
12. On March 12, 2007, the diagnostic teacher documented another contact from the 1st grade teacher regarding the evaluation process. (P-2; NT 142, 189).
13. A permission to evaluate was drafted on March 13, 2007 but was not issued to the grandparent. (S-13).
14. The diagnostic teacher felt that Student had shown progress on the Terra Nova testing so that moving forward with the evaluation process was unnecessary. (P-5 at pp. 4-5; NT at 143-144, 205-208).
15. Student’s grades in 1st grade showed the maintenance over the school year of grades at roughly a 70% achievement level in reads accurately/fluidly, demonstrates knowledge of reading vocabulary, uses the writing process effectively, and writing skills such as grammar/sentence structure/capitalization/punctuation. (P-15 at page 1).
16. Student’s grades in 1st grade showed a decline over the school year to the roughly 70% achievement level in reading skills such as phonics, meanings, grammar, punctuation, and spelling words. (P-15 at page 1).
17. Student’s grades in 1st grade showed the maintenance over the school year of grades above the 70% achievement level in understanding of literary elements, and comprehension. (P-15 at page 1).
18. At the end of 1st grade, Student’s teacher completed a Memorandum for Grade Assignment recommending promotion to 2nd grade but noted “low/below grade level in reading but showing improvement”. The teacher further noted as an area of weakness

- “oral reading/fluency and comprehension. Also writing skills”. The teacher’s recommendations for the 2nd grade included: “promote to 2nd grade. Recommended for Title I reading and evaluation to identify specific reading/language weaknesses.” This memorandum was shared with Student’s grandmother on June 5, 2007. (P-3; NT at 316-317).
19. Although testimony conflicted on Student receiving Title I reading services in 1st grade, Student apparently received informal reading support from the District’s Title I reading teacher in 1st grade. (NT at 279-280, 319-320, 331).
 20. By the end of the 2006-2007 school year, the student had not been evaluated, and an evaluation process was not underway.
 21. Student began the 2007-2008 school year in 2nd grade. Student was exhibiting similar difficulties in reading, spelling and writing that Student had exhibited in 1st grade. (NT at 83-87).
 22. In conversations at the end of the 2006-2007 school year and the beginning of the 2007-2008 school year, Student’s 2nd grade teacher was told by the principal and the diagnostic teacher that the student had been referred for an evaluation. (NT at page 89).
 23. Student received Title I reading and math support from the beginning of 2nd grade. (NT at 88, 216-217, 283).
 24. In September 2007, the District administered a DIBELS and Diagnostic Reading Assessment to the student. The student rated “at risk”. The student was monitored through October. (S-22; NT at 92, 217).
 25. On November 20, 2007, Student’s 2nd grade teacher filled out and turned in to the diagnostic teacher another Request for Individual Educational Evaluation. The form was signed by the teacher and the building principal. (S-9).
 26. In the Request for Individual Educational Evaluation, the 2nd grade teacher indicated that the student was receiving remedial services in reading and math. In the section entitled “specific reason for evaluation”, the teacher wrote: “low test scores – constant redirection to stay focused (sic) and on task – below grade level decoding skills + phonemic awareness.” (S-9 at page 1).

27. In the section addressing measures already undertaken, the teacher wrote: “all tests and assignments are read to stud. Reading as well as math tests.” (S-9 at page 1).
28. On the form, there is a section to address peer and teacher relationships. In this section, however, the teacher wrote: “Low test scores in math, reading and spelling – student weak in decoding skills and phonemic awareness is a big part of low scores. Poor retention skills and sight word recognition”. (S-9 at page 2).
29. In a section to address other concerns, the teacher wrote: “stud exhibits avoidance whenever new instruction occurs. Each time new material is introduced or indep. work is given stud. asks to leave the room.” (S-9 at page 2).
30. On a checklist of “persistent characteristics”, the teacher has indicated that the student is below grade level, does not retain learning, and is easily distracted. (S-9 at page 2).
31. At this time, Student’s teacher indicated that the student was rubbing Student’s eyes and squinting, and so the District initiated a vision check. (NT at 101-102, 167-168).
32. The diagnostic teacher, in a note to the school nurse, wrote: “was referred for testing at the end of last yr but I’m just getting to Student. (The 2nd grade teacher) says Student squints + rubs Student’s eyes.” The diagnostic teacher testified that this note referred to the evaluation process at the end of the student’s 1st grade year. (S-12; NT at 189-190).
33. The District checked Student’s vision and, on December 6, 2007, found that Student had “failed near + far states”. (S-12).
34. From December 2007 through April 2008, there were complications involving the student’s need for glasses. Student had two examinations with an eye clinic, one which found Student not to need glasses and subsequently one which found that Student did. Student also pulled a ruse where Student wore Student’s grandmother’s glasses to class and claimed they were Student’s own. (NT at 58-63, 102-105, 220-224).
35. On April 24, 2008, Student passed the District’s vision check while wearing Student’s glasses. (S-14).
36. The grandparent signed the March 13, 2007 permission to evaluate on April 28, 2008. (S-13).

37. On May 9, 2008, the principal sent a letter to the grandparent indicating that Student had lost Student's glasses and that the District would not continue the evaluation process if Student did not have Student's glasses. (P-7; S-19).
38. On May 20, 2008, the grandparent formally rescinded the permission to evaluate. (P-8; S-21).
39. On June 2, 2008, the grandparent executed a new permission to evaluate. (P-11; S-23).
40. Student finished 2nd grade with grades in reading and writing (except for understanding of literary elements) consistently at the lowest levels. Grades in the writing process and structured writing were not assigned at any point in the school year. (P-15 at page 2).
41. Student's 2nd grade teacher recommended that Student repeat 2nd grade. The student was, however, promoted to 3rd grade for the 2008-2009 school year. (P-9; NT at 88-89, 242).
42. On August 15, 2008, an independent educational evaluator found that Student had severe weaknesses in reading, with skills generally at the 1st grade level. In written expression, Student showed weak spelling skills. (P-12 at page 21).
43. The evaluator found that Student has a specific learning disabilities in reading and written expression as well as attentional and adjustment disorders. (P-12 at page 22).
44. The District issued an evaluation report November 13, 2008, four days prior to the first hearing session in this matter. (P-19).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education and related services for students with disabilities is addressed in federal law (IDEIA) and Pennsylvania law (Chapter 14).⁴

Obligation to Identify

School districts in Pennsylvania are under an obligation to locate, identify, and evaluate students who are in need of special education.⁵ Once a student is suspected of having a disability, a school district must evaluate the student within a reasonable period of time.⁶ Under Pennsylvania law in effect at the time of the disputed events in this matter, the evaluation should have been completed and the evaluation report issued within 60 school days of the date the school district received permission to evaluate.⁷

In the instant case, the District has failed to perform a timely evaluation of the Student . Early on in 1st grade, within the first marking period, Student's teacher was sharing concerns about specific aspects of Student's reading. (FF 4). By January 2007, half way through the student's 1st grade year, the teacher had initiated the process to refer Student for an evaluation (FF 5), and on February 2, 2007, the required

⁴ 34 C.F.R. §§300.1-300.818; 22 PA Code §14.101-14.163.

⁵ 34 C.F.R. §§300.111, 300.122; 22 PA Code §14.122.

⁶ Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999).

⁷ 22 PA Code §14.123.

paperwork to begin the process was submitted to the District's diagnostic teacher. (FF 7). The teacher's concerns on the referral paperwork were detailed and specific and listed wide-ranging difficulties with the student's skills in reading and writing. (FF 8, 9, 10). Yet permission to evaluate the student was not sought.

Five weeks later, after waiting for non-individualized standardized test results, the District drafted a permission to evaluate on March 13, 2007 but did not issue it to the Student's grandmother. (FF 11, 12, 13). More time passed waiting for standardized test results at which point the decision was made not to pursue the evaluation. (FF 14). But the student's performance in 1st grade continued to show no progress, and included regression in certain areas, even as the student received ad hoc Title I services in reading. (FF 15, 16, 17, 19).

Immediately upon starting 2nd grade, Student showed the same deficits in reading and writing. The District provided Title I services from the outset of the school year, rated Student "at risk" on reading assessments, and, on November 20, 2007, received a referral for an evaluation from the 2nd grade teacher. (FF 23, 24, 25, 26, 27, 28, 29, 30).

The complications of the Student's vision screening and eyeglasses will be addressed below. But it was not until April 28, 2008 that the District sought and received permission to evaluate. (FF 36).

Student's 1st grade teacher, certified in elementary and special education and having over twelve years experience including experience in learning support environments,⁸ raised concerns in November 2006. Yet the literal wait-and-see approach embraced by the District resulted in the evaluation of the student not being initiated by the District for seventeen months.

Every individualized or classroom assessment of the student indicated that the student was, at best, a struggling reader and writer. (FF 8, 9, 10, 15, 16, 17, 18, 21, 24, 26, 27, 28, 29, 30, 40). Every professional in the District who encountered the student recognized these needs and spoke explicitly about an evaluation. (FF 7, 12, 22, 24, 25, 32).

It is the considered opinion of this hearing officer that the District knew or should have known that the student required an evaluation as of February 2, 2007 when the 1st grade teacher made a formal referral for an evaluation under the District's procedures. Assuming a reasonable period of ten calendar days to obtain the grandparent's permission, the District should have begun to evaluate Student no later than February 12, 2007.

⁸ NT at 306-308.

Accordingly, by not beginning an evaluation process by February 12, 2007, the District denied Student a free, appropriate public education (“FAPE”).

Compensatory Education

Compensatory education is an equitable remedy available for a deprivation of FAPE.⁹ It is the considered opinion of this hearing officer that compensatory education is an appropriate remedy for the District’s denial of FAPE.

Given the depth of the student’s reading disability, and the pervasive effect on Student’s ability to engage the entire early elementary curriculum,¹⁰ the award will amount to full days of compensatory education. There are, however, the complications presented by the student’s vision issues. While the record is not clear on when Student’s vision needs should have been diagnosed, the District was right to be concerned about Student’s vision needs, especially since Student needs Student’s glasses to read. The record supports the notion that the

⁹ Ridgewood; M.C. v. Cent. Reg’l Sch. Dist., 81 F.3d 389 (3d Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 488 U.S. 923 (1991).

¹⁰ The 2nd grade teacher, for example, noted that every test and assignment had to be read to the student. P-9, S-9.

District knew about Student's vision needs on December 6, 2007. (FF 33). Student did not have Student's glasses available on a regular basis to allow the District to perform its evaluation until June 2, 2008. (FF 35). Therefore, the award will amount to half-days of compensatory education during this period.

As for the nature of the compensatory education award, the grandparent may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of Student's present or future individualized education plans ("IEP"). These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for Student and Student's grandparent.

There are financial limits on the grandparent's discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of Student's present or future IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services.

More specifically, the award for compensatory education shall begin on the 60th school day after February 12, 2007. The award shall amount to 5 hours¹¹ for every school day that Student attended from this date through December 5, 2007. The award shall amount to 2.5 hours for every school day that Student attended from December 6, 2007 through June 2, 2008. The award shall further amount to 5 hours for every school day that Student attended from June 3, 2008 to November 13, 2008 (the date that the District issued an appropriate evaluation report).

An order shall be issued accordingly.

Independent Educational Evaluation

In the summer of 2008, the grandparent sought an independent educational evaluation. This came nearly eighteen months after the District should have sought permission to evaluate in February 2007. The District's evaluation relies to a large degree on the independent evaluation. Given the District's unfathomable dawdling in evaluating Student and the ultimate strength of the independent evaluation relied upon by the District, the grandparent must be reimbursed for the independent educational evaluation.

¹¹ The student's minimum school day is 5 hours (900 required hours over 180 school days). 22 PA Code §11.3.

An order shall be issued accordingly.

CONCLUSION

The District has denied a FAPE to Student by not seeking permission to evaluate Student in February 2007. Compensatory education will be awarded as a remedy for this deprivation of FAPE. Additionally, the District must reimburse Student's grandmother for any out-of-pocket costs related to the independent educational evaluation issued on August 15, 2008. An order will be entered accordingly.

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ORDER

In accord with the findings of fact and conclusions of law set forth above, the student is entitled to an award of compensatory education, the nature of which is outlined above, in an amount calculated as follows:

- 5 hours per school day Student attended from the date of the 60th school day after February 12, 2007 through December 5, 2007, plus
- 2.5 hours per school day Student attended from December 6, 2007 through June 2, 2008, plus
- 5 hours per school day Student attended from June 3, 2008 through November 13, 2008.

The Scranton School District is further ordered to reimburse Student 's grandparent for all out-of-pocket expenses incurred in obtaining the independent educational evaluation of August 2008.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

February 23, 2009