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DECISION

Due Process Hearing for GD

ODR File No. 7250/06-07 KE

Date of Birth: xx/xx/xx

Dates of Hearing: February 19 and February 23, 2007 – Closed Hearing

Parties to the Hearing:

Representative:

Pocono Mountain School District
P.O. Box 200
Swiftwater, PA 18370

None

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Hearing Officer: Debra K. Wallet, Esq.

Record Closed: March 5, 2007

Date of Decision: March 20, 2007

BACKGROUND:

Student is a xx-year-old (date of birth xx/xx/xx) ninth-grade student of the Pocono Mountain School District [hereinafter School District] with a specific learning disability in reading. His Parents contend that the School District's August 29, 2006 IEP has not been properly implemented and that he has been denied a free appropriate public education [hereinafter FAPE] during the ninth grade year.

Parents previously challenged the appropriateness of the August 29, 2006 IEP. In a November 14, 2006 Decision and Order, a Due Process Hearing Officer determined that the IEP was appropriate, that the School District had complied with its pendency obligations, and that no compensatory education was owed for an alleged denial of FAPE during the seventh grade school year. (Exhibit HO-2).

By way of relief in this case, Parents seek compensatory education for the first semester of the 2006-2007 school year, request that a private clinical psychologist selected by them become part of Student's IEP team, and ask that progress monitoring be strengthened by way of a report submitted to the Parents bi-monthly.

The School District contends that it provided FAPE, that many of the Parents' concerns about the August 29, 2006 IEP have already been resolved in the prior Due Process Hearing, and that none of the requested relief is appropriate.

ISSUES:

1. Did the School District provide FAPE during the first semester of the 2006-2007 school year?
2. Are Parents entitled to relief for the School District's failure to provide FAPE?

FINDINGS OF FACT:

Background

1. Student is a xx-year-old (date of birth xx/xx/xx) who resides with his Parents within the School District. Student is currently in the ninth grade.
2. When Parents felt that a proposed IEP dated August 29, 2006 was not appropriate, a Due Process Hearing was convened and a Hearing Officer determined by Order dated November 14, 2006 that the proposed IEP was appropriate. (Exhibit HO-2).
3. Less than a month after the prior Hearing Officer's decision, on December 6, 2006, Parents requested a compliance monitoring investigation by the Pennsylvania Department of Education [hereinafter PDE].
4. The School District requested that the PDE dismiss its investigation because the matter was barred by *res judicata*, citing the November 14 Hearing Officer's Decision. When the PDE responded that it considered the matter to be one of proper implementation, the School District moved the complaint from PDE to due process.
5. On January 15, 2007 the parties engaged in a Resolution Session.
6. The parties met for the first scheduled Due Process Hearing on February 19, 2007. The Hearing Officer allowed the parties to continue settlement negotiations and an agreement was tentatively reached. (N.T. 3-6).
7. When a written settlement agreement was not signed, the Hearing Officer convened the February 22, 2007 hearing at which time testimony from three School District witnesses and the Father was presented.
8. The following exhibits were admitted: Hearing Officer Exhibits 1 and 2, P-1 through P-10, and S-1. (N.T. 40, 41, 278, 280).

Ninth-grade IEP

9. The August 29, 2006 IEP is labeled "draft" and the pages are not numbered. The IEP recognizes that Student has a specific learning disability in reading, identified as dyslexia, and that he sometimes transposes letters as well as syllables while reading and writing. He has decoding weaknesses and sometimes expends three times the effort and energy while decoding the English language. The IEP calls for ongoing communication between the case manager and the regular education teachers as well as training for teachers on working

with students who are dyslexic. The IEP contains three measurable annual goals: (1) Given a systematic, multi-sensory approach to reading [Student] will complete steps 9 through 12 of the 12 step program with 97% accuracy; (2) Given a series of sixth grade level DIBELS passages, [Student] will read 145 words correct per minute with a minimum of 90% accuracy on three consecutive weekly probes; and (3) Given a writing assignment, [Student] will complete the assignment with a total performance in the proficient range as measured by the Writing Assessment Domain Scoring Guide (rubric) with a score of 13 or better on 4 out of 5 bi-monthly probes. The IEP contains a number of modifications and specially designed instruction including “multi-sensory multi-modality rating instruction.” (P-1).

10. The projected beginning dates in the IEP are September 5, 2006 for anticipated duration through August 28, 2007. (P-1).

11. The parties stipulated that the document marked Exhibit P-1 is the version of the IEP whose implementation is at issue in this case. (N.T. 86-87).

Director of Special Education

12. Dr. G, Director of Special Education for the School District, has a doctorate in Educational Leadership. She testified that she investigated the seven issues contained in Parents’ complaint and believed that the School District had complied. (*Seriatim*: N.T. 42-52).

13. Dr. G was not aware of when the progress monitoring for DIBELS and Wilson had been provided to the Parents. (N.T. 67; 82-83).

14. Dr. G sent out a revised IEP on or about January 19, 2007 to two experts for review. One was selected by the School District and one selected by the Parents. She conceded that the Parents stated they did not receive this revised IEP and that Parents came in to pick it up from Dr. G. (N.T. 79-81).

15. Dr. G testified that she believed Student’s teachers were trained to work with dyslexic students the first week in February 2007, after the first semester had ended on January 25. (N.T. 90-91).

16. Dr. G testified that the final Reevaluation Report [hereinafter RR] written by Dr. C was presented to the Parents prior to an IEP meeting on December 20. She testified that the date of the report is April 27, 2006 with a revised date of June, 2006. (N.T. 106-108).

17. According to Dr. G, an addendum to the RR was done December 20, 2006 and presented to the IEP team but that the Parents had concerns about the report and did not sign it. (N.T. 110-112).

18. On December 5, 2006, Parents sent a letter to Mr. G, Supervisor of Special Education, complaining of a number of implementation issues. This letter was, in part, a response to a December 4, 2006 letter from Mr. G thanking the Parents for their attendance at a November 21, 2006 assistive technology meeting. Mr. G acknowledged receipt of an independent evaluation by Dr. H on October 4, 2006. According to Mr. G the IEP team would meet again when an IEP facilitator from ODR and the School District's evaluator could be present. Parents expressed displeasure with delays in implementation of DIBELS, delays in training of Student's teachers, and the omission of math deficiencies. (P-5).

19. After the prior Hearing Officer's decision, Dr. G notified her staff to implement the August IEP. (N.T. 124-125).

Reading Specialist

20. Mrs. C, a certified Wilson teacher, is employed by the School District as a Reading Specialist responsible for implementing Wilson instruction for Student. She confirmed that she was not available to teach on October 5, 10, 16, 17, 23, 24, 26, 27, and December 1, but she left lesson plans to be followed by the substitute teacher. (N.T. 137-139).

21. Mrs. C is certified in Level 1 of the Wilson Program. She was certified at the end of the 2006 school year. (N.T. 158).

22. Except for her absences, Mrs. C saw Student one-on-one every day for a 90-minute period during the first semester of the 2006-2007 school year. She no longer sees Student. In the previous year she taught him for a 45-minute period. (N.T. 139-141).

23. Although the IEP does not designate the frequency of the Wilson training, Mrs. C testified that Student was scheduled to be with her Monday through Friday during the third period. (N.T. 155-156).

24. Mrs. C wrote Student's Wilson annual goal and short term objectives. (N.T. 185).

25. Mrs. C did not provide progress monitoring directly to the Parents but testified that this reporting would go through the Case Manager. (N.T. 157).

26. Mrs. C testified that Student met his measurable annual goal with respect to the Wilson Reading Method. She emailed the Case Manager with this information and telephoned Student's mother to advise her that he had completed the goal. This was done sometime in January, 2007. (N.T. 177-178).

27. Mrs. C testified that each of the Wilson short-term objectives 1 through 4 had been met and that this information was communicated to the Case Manager. (N.T. 178-180).

28. Student's Wilson program stopped because he reached step 12. (N.T. 184).

29. Student is to receive continuing Wilson maintenance, which will be the subject of an additional IEP team meeting. (N.T. 187).

30. Mrs. C testified that she trained Student's teachers in the Wilson method in December, 2006. This training included teachers Student had during the first semester and those he would have during the second semester. In addition to this formal training, she testified that she discusses dyslexic students in an informal fashion with members of the team. (N.T. 142-143)

31. Mrs. C trained Student's teachers in the eighth grade for 45 minutes and approximately the same time for the high school teachers. These teachers do not need to pass any criteria to be considered trained. (N.T. 159).

32. Parents have questioned whether the quarterly progress reporting has been done with respect to the annual goal on DIBELS, which stands for Dynamic Indicators of Basic Early Literacy Skills. (N.T. 64-66).

33. Mrs. C did not consider herself responsible for implementing the DIBELS goals. She believed that it was the Case Manager who was responsible for this part of the IEP. When it "became an issue," she started to do it. Student achieved 132 words per minute, a sixth grade level. (N.T. 160-162; 180).

34. Mrs. C conceded that Student did not reach the DIBELS measurable goal of 145 words per minute. (N.T. 163).

35. Although there seemed to be some consensus that the DIBELS IEP goal was no longer appropriate, the team did not reconvene to take it out of the IEP. (N.T. 164-165).

36. Mrs. C reported to the Case Manager that Student did not meet his goals in DIBELS. She did not know whether a quarterly progress report was made on DIBELS. (N.T. 181).

Case Manager

37. Ms. C is employed by the School District as a Special Education Teacher. She is currently Student's case manager. (N.T. 193-194).

38. The Case Manager testified that she did not address any of the matters in the IEP with the Parents because she “didn’t realize that they were issues.” (N.T. 204).

39. The Case Manager was not certain of the dates when teachers were trained in the Wilson method. She did not know whether she had communicated to the Parents that the training had occurred. (N.T. 206-207).

40. The Case Manager testified she sent a progress monitoring report to the Parents at the end of the first marking period and the end of the second marking period. (N.T. 208).

41. The Case Manager believed that Mrs. C had responsibility for administering the DIBELS in Student’s IEP. (N.T. 217). She testified that she specifically communicated to the reading teacher that she would be responsible for the implementation of the DIBELS, but the Case Manager could not give a specific date when she did so. She did not remember receiving any progress reports from the reading teacher regarding DIBELS. (N.T. 223-224).

42. Although the Case Manager testified that she provided Parents the chart on the DIBELS progress by mailing it to them, she could not give a specific date when she did so. (N.T. 218).

43. The Case Manager testified that she sent weekly emails to the Parents reporting Student’s progress. (N.T. 219). She specifically stated: “So every Friday I let you know how his grades are, if he’s missing assignments, if he needs to work on a specific area. That’s what the purpose of these emails are.” (N.T. 255).

44. After reviewing an estimated 300 pages of emails (S-1), the Case Manager was able to find one email between November 14, 2006 and January 5, 2007 which constituted a “Friday progress report” directly from her to the Parents. She conceded that her testimony may have been “confused.” (N.T. 245; 265-269, 274).

45. The Case Manager handed Parents the chart describing Student’s progress in DIBELS at the due process hearing. (P-10; N.T. 257). She also testified that she mailed this document (P-10) to the Parents’ home address approximately two weeks before the due process hearing but she could not identify an exact date. (N.T. 261-262).

46. The Case Manager thought that DIBELS was the only goal on which she had to report Student’s progress to the Parents. (N.T. 264).

Father

47. [redacted] , Student's father, received no progress monitoring reports other than a report card after the second marking period and a few pieces of paper from teachers. These documents were marked and admitted as Exhibit P-6. (N.T. 228-229).

48. Father stated that he believed the Wilson training delay affected his son's ability to learn in the algebra class. The teacher was not able to adjust her teaching style to Student's learning and specific needs. (N.T. 231-232).

49. Father summed up his relationship with the School District as follows: "I wouldn't say we had a relationship. I think they don't, you know, they don't do anything unless you push them." He did not think it was a cooperative relationship. (N.T. 235-236).

50. The [family] received no documentation whatever on DIBELS. (N.T. 240).

CONCLUSIONS OF LAW

1. Student received FAPE during his ninth-grade year.
2. No compensatory education or other remedy is due to Parents.

DISCUSSION OF ISSUES

1. Did the School District provide FAPE during the first semester of the 2006-2007 school year?

Our United States Supreme Court has held that the burden of proof in an administrative hearing challenging an IEP is upon the party seeking relief. *Schaffer v. Weast*, ___ U.S. ___, 126 S. Ct. 528 (2005). In this case, the Parents contend that the August 2006 IEP has not been properly implemented. Therefore, Parents must bear the burden of proof on the question of implementation of this IEP.

Parents have raised seven specific issues in their request to PDE and these contentions have now become the basis of this Due Process Hearing. The Hearing Officer will address each of these contentions separately.

A. Substitute teachers certified in Wilson instruction were not available on October 5, 10, 16, 17, 23, 24, 26, 27 and December 1.

The School District accurately states that the IEP does not specifically refer to the Wilson program but rather to a “systematic, multi-sensory approach to reading.” (See P-1). Nevertheless, the School District agrees that it intended to implement the IEP using the Wilson program and the reading specialist did, in fact, utilize the Wilson method.

It is agreed that the substitute teachers on the listed dates were not necessarily certified in the Wilson method. The Hearing Officer notes, however, that only one of the cited dates occurred after the prior Hearing Officer had upheld the August IEP by his decision dated November 14, 2006. (HO-1). The prior Hearing Officer previously determined that the School District met its pendent program obligations. (HO-2, pg. 9). Consequently, this Hearing Officer feels constrained to limit her evaluation of the IEP implementation to the period after November 14, 2006.

As a matter of law, a single 90-minute period in which the School District failed to provide a certified Wilson instructor cannot rise to the level of a denial of FAPE. Student completed his reading goals by advancing through the conclusion of the Wilson reading system. (N.T. 177-178). Even if the one day of instruction by a non-certified teacher were to constitute a technical violation of the IEP, and the Hearing Officer is not prepared to so hold, there has been no substantive failure to provide the required services in the area of reading instruction.

B. Failure to provide progress reports on DIBELS.

If anything is clear from this rather muddled record, the Case Manager believed the

reading teacher was responsible for this DIBELS goal and the reading teacher thought that the case manager was responsible. (*See* N.T. 180 and 217). Although the Case Manager testified that she sent a progress report consisting of a chart of DIBELS progress (P-10) to the Parents approximately two weeks before the due process hearing, she could not produce any evidence of this transmission. She was not even certain when it had been done. I find credible the testimony from Father that he received no such information. (N.T. 240). This Hearing Officer must conclude that there was, indeed, a complete failure to provide progress reports on DIBELS. Of course, that in and of itself does not constitute evidence of a denial of FAPE.

Student did receive DIBELS instruction by the reading specialist and apparently made progress although failing to meet his annual goal in this area. The Hearing Officer does not excuse the School District for its sloppiness in this area, but cannot conclude that the failure to provide progress reports was anything more than a technical violation of the IEP.

C. No weekly contact with case manager.

Perhaps the most troubling aspect of this case was the Case Manager's initial testimony that she made regular weekly reports on Fridays to Parents by email. (N.T. 207-208; 219-220). However, when pressed to identify those emails among a large volume of School District exhibits (S-1), the Case Manager admitted that she could not do so. (*See* N.T. 265-267).

After hearing all of the testimony in this case, it is relatively clear that the parties do not communicate well. Most of the blame must rest with the Case Manager, but the Director of Special Education failed to monitor the situation and should have been more aware of who was doing what. The School District appears to avoid contact with Parents and the Parents

seem to be unhappy with most of the information when it is communicated directly to them.

With regard to this issue, the Hearing Officer must find that very desirable weekly contacts between the Case Manager and the Parents have not occurred. Without ordering it to do so, she urges the School District to remedy this deficiency immediately.

D. R.R. of 4/24/06 is “still pending.”

Parents presented little to no evidence on this issue and the Hearing Officer is uncertain as to the precise nature of Parents’ complaint. In any event, Parents certainly have not met their burden of proof on this sub-issue.

E. Lack of training for teachers on dyslexia.

Parents maintain that the lack of dyslexia training has had a negative impact upon Student, especially in algebra. The reading teacher testified that she did provide formal and informal dyslexia training to the Student’s teachers in December. (N.T. 142-143). This testimony appears to be unrebutted by any other witness. Parents presented no hard evidence in this record of the impact on Student of any alleged failure in training.

It should be noted that Parents’ expert addresses the issue of difficulties in algebra (*See* P-9, p. 12) and the RR by Dr. C also mentions mathematics and notes that any problems could be a result of teaching style. (See P-4, pp. 2-4). It is expected that both these reports will be fully considered at the next IEP meeting. The Director of Special Education indicated that this would be done.

F. Outside evaluation reports have not been entered into the IEP.

Similarly, there is scant evidence presented by the Parents on this issue. The Hearing Officer has been given an outside evaluation report supposedly submitted to the School District

but not entered into the IEP. (P-9). Only by way of closing argument has the Parents mentioned Dr. H, private clinical psychologist, who they wish to become part of the IEP team. There is simply no evidence in the record regarding the reason why Dr. H should be included in the IEP team, or why his recommendations, particularly for algebra, cannot be considered and incorporated into any revised IEP. The Hearing Officer has no choice but to dismiss this portion of the complaint.

G. Failure to implement computer-based tutoring program.

The Parents presented no evidence about a computer-based tutoring program or the School District's failure to implement such a program. Again, Parents have failed in meeting their burden of proof on this sub-issue.

2. Are Parents entitled to relief for the School District's failure to provide FAPE?

Compensatory education is a remedy designed to provide a student with the services he should have received pursuant to FAPE. When a student has been denied an appropriate educational program, compensatory education is an in-kind remedy. *Lester H. v. Gilhool*, 916 F.2d. 865 (3d. Cir. 1990), *cert. denied*, 499 U.S. 923 (1991). Having found that the School District offered and implemented an appropriate educational program, there can be no award of compensatory education.

Parents request the completion of the IEP in a timely fashion. They provide no explanation as to exactly what they believe must be done to the August IEP. It may be that Parents' requests to convene an IEP meeting have met with a slow response (*See* P-5, December 5 letter), but the School District is proceeding to consider the reports of the experts.

It is anticipated that this will now be done expeditiously.

Finally, the request that a private clinical psychologist become part of the IEP team is made without any citation to statutory or regulatory authority. Because the Parents are *pro se*, the lack of legal citation can be excused, but their failure to present any evidence regarding Dr. H cannot be excused. This requested relief is also denied.

CONCLUSION

If anything is apparent from this record, the communication between the School District and the Parents is woefully lacking. Although the Hearing Officer is reluctant to place blame in any particular corner, the Case Manager must surely bear some responsibility for a failure to communicate Student's progress in a timely fashion. Because of the history of the prior due process hearing, the School District may not feel comfortable in speaking to Parents who they may perceive as being difficult to please. Nevertheless, a lack of effective communication is decidedly detrimental to Student's progress.

The Hearing Officer encourages the parties to work together in the best interest of this child. On this record, there can be no finding of a denial of FAPE, but communication with the Parents absolutely must improve.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Parents are not entitled to compensatory education services or any of the relief requested in their written closing argument.

Date: March 20, 2007

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