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Due Process Hearing

HH (#7400/06-07 AS)  
Date of Birth: xx/xx/xx  
Date of Hearing: March 26 & April 3, 2007  
Closed Hearing

Parties to the Hearing

<u>Parent</u>	<u>Representative</u>	<u>Transcript Completed</u>
Ms.	Andrew Phillips, Esq.	April 9, 2007
		<u>Date of Decision</u>
		April 13, 2007
<u>School District</u>	<u>Representative</u>	<u>Hearing Officer</u>
Sugar Valley Rural Charter School	J. David Smith, Esq.	David Y. K. Lee

## **II. BACKGROUND**

Student is an xx -year-old student in the Sugar Valley Rural Charter School (hereafter School). Student is an eligible student and is currently in the 12<sup>th</sup> grade. The parent disagreed with the Notice of Recommended Educational Placement (hereafter NOREP) issued by the School and requested a due process hearing.

## **III. FINDINGS OF FACT**

1. Student, date of birth xx/xx/xx, is a student in the School. (N.T. 75. P. #1.)
2. Student is in the 12<sup>th</sup> grade receiving special education instruction in English, Math and Guided Study classes. (N.T. 460-461. P. #1 @ 4. H.O. #3 @ 1.)
3. A re-evaluation report (hereafter RR), dated November 30, 2006, concluded that Student continued to be eligible for special education with the disability category of Specific Learning Disabilities . (N.T. 238-240, 251-254. P. #3 @ 6.)
4. Specific academic needs were identified in reading accuracy and fluency, as well as math skills. (P. #3 @ 5.)
5. An Individualized Education Program (hereafter IEP) was subsequently developed with the IEP Team Meeting Date of December 6, 2006. (N.T. 354-355. P. #1.)
6. Goals and objectives for Math, Spelling, and Reading were identified. (N.T. 362-368. P. #1 @ 9-11.)
7. The IEP identified Student's educational placement as special education instruction in English, Math, and Guided Study. (P. #1 @ 14.)

8. Spelling instruction is provided during study hall, which is not considered a Subject with credit, by a special education teacher. (N.T. 370-372, 462. H.O. #3 @ 1.)

9. Reading is scheduled in a regular education classroom with one-on-one pullout by a special education teacher. (N.T. 462-466. H.O. #3 @ 1.)

10. The parent disagreed with the subsequent NOREP and requested a due process hearing, by signature dated January 15, 2007, with the reason being "I do not agree with the IEP and I do not agree with evaluation". (N.T. 455. P. #2.)

11. The School did not forward a request for due process hearing to the Office for Dispute Resolution (hereafter ODR). (N.T. 456.)

12. Subsequently, counsel for the parent submitted a request for due process hearing to ODR on February 22, 2007. (N.T. 29-31. H.O. #1 @ 2.)

13. Due process hearing sessions were held on March 26, and April 3, 2007.

#### **IV. ISSUES**

1. Is Student entitled to an Independent Educational Evaluation (hereafter IEE) at public expense? (N.T. 17-18, 25. H.O. #1.)

2. Is Student's IEP appropriate? (N.T. 17, 24-25, 33. H.O. #1.)

3. Is Student entitled to compensatory education? (N.T. 25, 477-478. H.O. #1.)

#### **V. DISCUSSION AND CONCLUSIONS OF LAW**

##### Need for evaluation

The parent's request for an evaluation came from the disapproval of the NOREP when the parent did not agree with the evaluation. (F.F. #10.) In this instance, the RR was produced following a corrective action ordered in the Complaint Investigation Report (hereafter CIR) issued on October 24, 2006. "The chief executive officer (CEO) or designee shall contact the parent, determine the assessment procedures to be administered, issue a Permission to Reevaluate, and conduct a reevaluation no later than December 1, 2006. Once the assessment procedures are completed, the CEO or designee shall convene the IEP team to complete the Reevaluation Report and issue the reevaluation report to the parent no later than December 8, 2006." (S. #7 @ 8.)

There was much testimony from the parent indicating that consent was never given for the evaluation and the Permission to Evaluate was never received. (N.T. 167, 201-207, 219-220.) This is a curious, if not self-defeating, position taken by the parent since the evaluation was a corrective action ordered resulting from a complaint to the Bureau of Special Education filed by the parent. Nevertheless, the parent and the student did not indicate disagreement on the signature page of the resulting RR. (F.F. #10.)

Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions.

34 CFR §300.311(b)

The parent testified that the signature page was signed without the completed document. (N.T. 216-218. P. #3 @ 6.) The School's testimony regarding the development of the RR would indicate that the signatures were executed apart from the completed document. (N.T. 259, 345.) In dicta, the School is advised to review its procedure in the development of a RR. An opportunity to see the final report by all members before signing is a preferable procedure than to expect signatures affixed to something not yet finalized . Furthermore, team members should be advised of the opportunity to submit divergent viewpoints and conclusions which are then attached to the finished RR.

The issue of an IEE was identified in the due process hearing request, submitted by counsel on behalf of the parent, under Proposed Resolution. "The District will pay for or reimburse for appropriate evaluations..." (H.O. #1 @ 4.)

If a parent requests in independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

34 CFR §300.502(b)(4)

Aside from the procedural matters regarding the RR, the parent and Student were apparently concerned with the reference to Student's IQ scores. (N.T. 130-131, 159.) This was an emphasis misplaced in the reading of the whole RR. (P. #3.) The School's psychologist testified to her review of records and made brief summaries of existing information. (N.T. 241-242, 247-248.) Individualized assessments, intellectual and achievement, were not performed in the preparation of the RR. (N.T. 251, 327-329.) The RR contained input from Student's classroom teachers and the parent. The RR concluded that Student continues to be a student with a disability and in need of special education. (N.T. 258-259.) There is no evidence before this Hearing Officer that the conclusions of the RR are being contested.

It is the determination of this Hearing Officer that the RR meets the requirements of 34 CFR §300.305(a) and (b) regarding reevaluation. Student is expected to meet the requirements for graduation in about 2 months. (N.T. 468-469.) There is no reasonable expectation of return of data in the time remaining even if the process of securing an IEE, at public expense or otherwise, is initiated. There is evidence that the Office for Vocational Rehabilitation (hereafter OVR) is actively involved with Student. (N.T. 108, 185.) An evaluation report is pending from an outside agency sponsored through OVR. (N.T. 183-184, 221-223.) The expected forward looking post- secondary education planning document for Student may be incorporated into her school program, when it becomes available and if appropriate, for the short time remaining. The parent's conditional request for additional evaluation, under the umbrella of an IEE, contingent upon the OVR evaluation results cannot be sustained. (N.T. 224.)

It may be argued that the RR can be better written and should contain more data on specific skills deficits that can be translated into specific areas of instructional emphases; that the need for a behavioral assessment<sup>1</sup> may be better explained; that the determination of needs should be more closely correlated with the assessment information; that if input from teachers do not, or cannot, provide meaningful data regarding the student's progress towards IEP goals or in the general curriculum, additional data in those areas will need to be obtained. This Hearing Officer recognizes, in this instance, the time constraint in the reevaluation process ordered by the CIR and the perceived inability to act without a signed Permission to Evaluate. (N.T. 328. S. #7 @ 8.) There is no constraint, however, for the School to conduct the necessary on-going curriculum based assessments in order to determine instructional levels and progress in the general curriculum as part of the instructional process.

#### Appropriateness of IEP

The IEP at issue before this Hearing Officer has the implementation date of December 11, 2006. (P. #1.) The parent signed the NOREP indicating disagreement on January 15, 2007. (F.F. #10.) The due process request submitted by parent's counsel did not specifically identify the IEP(s) in question. (F.F. #12.)

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<sup>1</sup> The School is advised to review its understanding that a FBA and other assessment procedures are automatically included in the State form for reevaluation. (N.T. 317.)

The IEP was developed as a corrective action ordered in the CIR dated October 24, 2006. "...After the reevaluation report is completed, the CEO or designee shall convene an IEP team meeting to review and revise an IEP for the student no later than December 15, 2006. The IEP shall comply with specific special education regulations, e.g. measurable goals, present levels of academic performance, transition services, and other sections. To verify completion of the corrective action, the CEO or designee shall submit a copy of the Permission to Reevaluate, Reevaluation Report, Invitation to an IEP Team Meeting, IEP and Notice of Recommended Educational Placement to this Special Education Advisor no later than December 22, 2006." (S. 7 @ 8.) The School submitted the necessary documentation and the case was closed by the Special Education Advisor by letter dated December 28, 2006. (S. #2.)

Upon review of the testimony and the IEP, it is the opinion of this Hearing Officer that the IEP contains the elements required under 34 CFR §300.320. *Definitions of individualized education program.* Although the present levels of academic achievement and measurable annual goals may be more descriptive and specific, this does not render the IEP defective or inappropriate. (P. #1 @ 3, 9-11.) There was much discussion regarding the lack of grade level indicators. (N.T. 417-423.) There was no supporting testimony to show how the lack of such would render the IEP goals inappropriate.

This Hearing Officer finds, however, the implementation of the IEP, specifically in the area of reading, to be problematic. The IDEA requires that states receiving federal funds for education must provide every disabled child with a free appropriate public education (hereafter FAPE). This entitlement is delivered by way of an IEP. Carlisle Sch. Dist. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995). The RR specifically identified needs in reading and math for consideration by the IEP team. (F.F. #4.) Student is in Learning Support classrooms for Algebra ½ and Guided English 12 taught by a special education teacher. (N.T. 460-461. H.O. #3 @ 1.) She is, however, in a regular classroom for Reading taught by a regular education teacher. (N.T. 81, 96-97, 98-101. F.F. #9.) She has contact with Ms. N, a special education teacher who also serves as the School's Director of Special Education, in a resource setting which is termed Guided Study. (N.T. 78-79, 349, 351, 466-467.) Guided Study, in place of an unstructured study hall, is not considered a Subject with credit. (N.T. 370-372. H.O. #3 @ 1.) The IEP states "Student will receive learning support service classes for English, math, and Guided Study. She will participate in the regular education classroom for all other classes. (P. #1 @ 14.) Student testified that Ms. N, the special education teacher, "took it [Reading] over and it was a one-on-one reading". (N.T. 99.)

The involvement of Ms. N in Student's Reading class is rather confusing. It began at the end of October, apparently in response to a finding in the CIR. (N.T. 464. S. #7 @ 7.) Working one-on-one with Student in reading does not in itself constitute a provision of FAPE. There is no indication on the IEP that reading instruction would be delivered in such a manner. The IEP in fact reads that reading instruction would be in a regular education classroom. There was no evidence of a planned approach to meet Student's identified needs in reading. Ms. N spoke of it being a "co-teaching experience" (N.T. 362) and yet they "go out one-on-one so she [Student] can read out loud and not distract others and be able to focus more" (N.T. 463). There is no evidence of a coordinated plan in reading for Student.

A. Sometimes she'll go — if they're going to do like a play together, like out of Read Magazine, she'll go in and participate with the group. Or sometimes Ms. M pulls her out and does special things with her one-on-one, but *I'm not sure what they are* (emphasis added).

Q. Where do you work with her?

A. In the computer lab.

Q. Do you have some kind of a plan in your mind as to what you're going to do with her?

A. We usually follow what Ms. M's doing, the reading teacher. If she's going to be reading silently, we'll read silently. If they're going to be working on their journal entries or vocabulary, that's what we do.

(N.T. 464-465.)

Earobics, a computerized instructional tool, was purportedly obtained to assist Student in developing her reading skills. The software was only properly installed and made ready for use on March 23, 2007, even though the School received it at the end of November, 2006. (N.T. 90, 380-381.) There is nothing in the IEP indicating how, or which part of, the Earobics program meets the specific needs of Student, and how it will complement the IEP goals in reading. There did not seem to be much planning regarding its utilization. Since it was just installed prior to Student using it for the first time, did the School have a working knowledge of the total program? Was it determined to be appropriate for Student to start at the very first level assuming the software is the correct Adolescents and Adults version? (N.T. 379.) Given Student's impression and perception from her one time exposure, it is doubtful that the program was fully explained to her. (N.T. 90-91.)

It is therefore determined that Student was not provided with FAPE in the area of her identified reading needs. Compensatory education is a remedy that is appropriate when an eligible student has been denied FAPE. Compensatory education is an equitable remedy for FAPE violations. Thus compensatory education is an in-kind remedy. Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied, 499 U.S. 923, 111 S. Ct. 317 (1991). See also M.C. ex rel. J.C. v. Central Regional School District, 81 F. 3d 389, 108 (3d Cir. 1996).

From the IEP implementation date of December 11, 2006, to the date of this Decision, School was in session for one hundred forty-one days. Up until April 3, 2007, Student was not in school for twelve full days. (H.O. #3 @ 1-2.) The School has a cycle of 6 classes out of every 8 days. With fifty-five minutes of reading instruction per period, the total amount of compensatory education owed is therefore  $((141-12) \times 6/8)$  96.75 classes or  $(96.75 \times 55/60)$  88 hours. The compensatory time is to be used to provide specific remedial reading instruction outside of the regular school hours. Student is currently attending the [tutoring] Center (hereafter Center) as part of the compensatory education hours under corrective actions ordered in the CIR. (N.T. 77-78.) The manner in which compensatory education is to be provided will be mutually agreed upon by the parties. It is reasonable for the hours to be added at Sylvan. Should Student graduate prior to the exhaustion of the compensatory hours, the hours are to be provided, if Student wishes to continue her enrollment at Sylvan, or in another reading program.

Additional Items

Although not affecting the outcome of this present case in the calculation of compensatory education hours, the School is advised to take heed of the following items regarding procedural matters, which can be of significant impact in the delivery of special education programming and services. Procedural violations by school districts do not automatically compel a finding that a child has been denied FAPE. Appeals panel and court decisions consistently have held that the denial of a child's right to FAPE will be found where violations of procedural safeguards by a school district result in the loss of educational opportunity. W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9<sup>th</sup> Cir. 1992). See also B. G., Spec. Educ. Opinion No. 555 (1992); K. E., Spec. Educ. Opinion No. 545 (1991). Nevertheless, even though the School undertook the corrective action of scheduling training for its staff in special education regulations as ordered in the CIR (S. #7 @ 8. S. #8.), the School is to be cognizant that such continuing training needs to be built into future staff development activities with the goal of understanding and approximating best practice in the provision of special education programming and services.

1. The parent requested a due process hearing on January 15, 2007, by signature on the NOREP. (N.T. 455. P. #2.)

Each SEA must develop model forms to assist parents and public agencies in filing a due process complaint in accordance with 300.507(a) and 300.508(a) through (c) and to assist parents and other parties in filing a State complaint under 300.151 through 300.153. However, the SEA or LEA may not require the use of the model forms.

34 CFR §300.509(a)

When a parent does not approve the NOREP, the School, with resources that are not readily available to the parents, has the burden of informing the parents of the option of mediation and/or a due process hearing. Furthermore, the School is to assist, if necessary, the parents in completing the necessary forms to be submitted to ODR. Model forms may be found on the ODR website.

2. The purpose of progress reports is to provide a continuous documentation of the student's progress toward the IEP goals. They should be reported by the student's individual teachers. The student's rate of progress can lead to revisions of the IEP goals. There is nothing to prevent shorter intervals between reports if closer monitoring is deemed necessary. There is also nothing to prevent the School to use extra paper to report progress other than the narrow columns provided on the form in the present case. The 2<sup>nd</sup> quarter Progress Report showed Ms. N as the teacher for all the subjects in the report, with repetitive entries dated January 26, 2007. (N.T. 182, 193. S. #1.)

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP...

34 CFR §300.323(a)

...the term...IEP means a written statement...that must include--  
A description of--

(i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and  
(ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

34 CFR §300.320(a)(3)

3. A student's post-secondary planning is a cooperative effort between the School, the student, the student's family, and appropriate outside agencies. Student's needs and aptitude should be considered in collaboration with OVR especially given the involvement it apparently has had with Student. (N.T. 185.) This Hearing Officer finds the School's understanding regarding *transition* somewhat curious especially with reference to the CIR findings. (N.T. 460. S. #7 @ 9.)

...the IEP must include—

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 CFR §300.320(b)

To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.34 CFR §300.321(b)(3)

4. The RR indicated that “the academic functioning of Student is not significantly impaired by emotions or behaviors. (N.T. 335. P. #3 @ 4.) It is unclear as to why the IEP team then checked “behaviors that impede his/her learning or that of others” under Other Special Considerations given the limited behavioral observation date. (N.T. 333-335, 424-425. P. #1 @ 3.) Nevertheless, if a behavior plan exists to address behavioral needs, it is only reasonable to have such a plan with behavioral goals be included in the IEP. The behavior chart referenced in testimony is not in evidence. (N.T. 356.) Such a chart, as described, may provide some data in assessment but does not constitute a behavior management plan.

5. Student was [redacted] years of age at the beginning of the current 2006-2007 school year. Procedural safeguard rights needed to be provided to Student. (N.T. 300-301.)

Transfer of rights at age of majority. Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child’s rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under 300.520.

34 CFR §300.320(c)

A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)--

(1)(i) The public agency must provide any notice required by this part to both the child and the parents; and

(ii) All rights accorded to parents under Part B of the Act

- transfer to the child;
- (2) All rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; and
- (3) Whenever a State provides for the transfer of rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency must notify the child and the parents of the transfer of rights.

34 CFR §300.520(a)

6. There was much discussion and perhaps confusion as to what document was or was not received by the parent when they were sent by certified mail with return receipts. (N.T. 201-210. S. #4.) Any such confusion can be avoided simply by having the item, e.g. NOREP, IEP Invite, etc., noted on the green return receipt card.

## **VI. ORDER**

The School is ordered to take the following actions consistent with the Discussion above:

1. The School is to revise Student's IEP to include specially designed instruction in reading. With the very short time remaining in this school year, members of the IEP team will need to act most expeditiously without prolonging denial of FAPE.
2. The School is to provide Student with 88 hours of compensatory education in the form of reading instruction.

The School is not ordered to provide Student with an IEE at public expense.

April 13, 2007

Date

David Y. K. Lee

David Y. K. Lee  
Hearing Officer