

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.

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: Student

Date of Birth: XX/XX/XX

Date of Hearings:
February 23, February 26, April 8 & April 22, 2009

CLOSED HEARING

ODR Case # 9462-08-09-LS

Parties to the Hearing:

Mr. & Mrs.

Ms. Mary Ann Taylor
Director of Special Education
Carmichaels Areas School District
225 North Vine Street
Carmichaels, PA 15320

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pamela Berger, Esquire
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May 13, 2009

May 28, 2009

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INTRODUCTION AND PROCEDURAL HISTORY

Student is a teen age student residing in the Carmichaels Area 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. Specifically, Student has been diagnosed with specific learning disabilities in reading and math. The parents allege that the District has denied the student a free appropriate public education (“FAPE”) and make a claim for compensatory education due to deprivations in the student’s reading instruction and transition planning. Additionally, the parents claim that the student’s school assignment— a vocational education program—is inappropriate.

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

ISSUES

Did the District provide FAPE to the student through its reading instruction?³

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.

³ Parents alleged in their complaint deprivations of FAPE in the District’s math instruction. At the close of parents’ case, however, the District filed a motion that the parents had not met their burden to prove claims related to math instruction. The

Did the District provide FAPE to the student through its transition planning?

Is the student's school assignment inappropriate?

FINDINGS OF FACT

1. In an October 2000 re-evaluation report, issued while Student was in 3rd grade, Student continued to be identified by the District as a student with specific learning disabilities in reading and math. (Parents' Exhibit ["P"]-2).
2. Student attended the District through 5th grade. Student moved out of state for Student's 6th grade year, the 2004-2005 school year, and attended a private school for a portion of 7th grade, the 2005-2006 school year, returning to the District in January 2006 to complete Student's 7th grade year. (NT at 34-35).
3. In May 2006, the District issued a re-evaluation report. Student continued to be identified as a student with specific learning disabilities. The report noted that Student's reading was assessed twice in the spring of 2006: in February 2006, Student was instructional at the 3.0 level, and in May 2006, Student was instructional at the 2.6 level. Student's weaknesses in reading were noted as decoding and fluency. (P-1).

motion was granted, and so claims related to alleged deprivations in math instruction were dismissed. Hearing Officer Exhibit ("HO")-1, HO-2; Notes of Testimony ("NT") at 679-681.

4. Student's individualized education plan ("IEP") team met in May 2006 to develop Student's IEP. The IEP contained three reading goals: increasing Student's instructional reading level from 2.6 to 3.6 on the STAR reading test, increasing Student's fluency from 101 words per minute ("wpm") to 120 wpm, and completing a reading comprehension exercise with 85% accuracy. The May 2006 IEP was in effect for the end of the 7th grade year and most of the 8th grade year (P-4).
5. In the 2006-2007 school year, Student's instructional reading levels were assessed as follows: 2.5 in September 2006, 3.1 in November 2006, 2.8 in January 2007, and 3.1 in May 2007. (P-5).
6. Student's IEP underwent its annual review in May 2007. The IEP contained two reading goals: increasing Student's instructional reading level from 3.3 to 4.3 on the STAR reading test, and demonstrating 85% comprehension level from chapters of an assigned novel. The fluency goal was removed from the previous year's IEP. The May 2007 IEP was in effect for the end of the 8th grade year. (P-5).
7. The goal for increasing Student's instructional reading level in May 2007 IEP was originally written for an increase from a 3.1 instructional level to a 4.1 instructional level. Student's reading teacher, however, crossed out these levels and substituted the increase in levels from 3.3 to 4.3. The teacher testified that she

had substituted a more recent reading assessment administered before the IEP meeting, although this score (3.3) was not made part of any progress monitoring or present level of educational performance in the IEP. The instructional reading levels that were recorded as present levels of educational performance in the May 2007 IEP vary entirely from the instructional reading levels recorded by the student's reading teacher. (P-5 at page 10; P-8; NT at 792).

8. The District began using a reading curriculum called Fast ForWord in the 2007-2008 school year. Student's IEP was revised in September 2007 to add Fast ForWord as specially designed instruction for Student. (P-7; NT at 98-99, 445-446).
9. The Fast ForWord program is designed to focus on auditory processing of sounds as a strategy to improve reading performance. Utilizing earphones, a student works through sound recognition exercises to build phonemic awareness and other reading foundational reading skills. (NT at 391-392).
10. Student worked through the beginning/elementary level exercises of Fast ForWord and not the middle school/high school level exercises. The beginning/elementary level exercises include juvenile graphics and games as part of the process. Student made progress in most of the Fast ForWord exercises. (P-12, P-13, P-15,

P-16; School District Exhibit ["S"]-8, S-9, S-10, S-11, S-12; NT at 392-395).

11. Student's IEP underwent its annual review in May 2008. The IEP contained one reading goal: demonstrating 85% comprehension level from chapters of an assigned novel. The goal for progress in Student's instructional reading level was removed from the previous year's IEP. The May 2008 IEP was in effect for the end of the 8th grade year and most of the 9th grade year. (P-6).
12. The May 2008 IEP references a STAR assessment result of 4.6. There is no date as to when this score was ascertained. (P-6 at page 4).
13. There was no transition plan as part of the May 2008 IEP. (P-6).
14. At the May 2008 IEP meeting, Student's school assignment was discussed for the upcoming 2008-2009 school year, Student's 10th grade year. The student's mother was under the impression that the District would not allow the student to continue full-time at the District's high school and that Student would need to a vocational education program. The District's director of special education testified that the District registered the parent's and Student's concerns about attending the vocational education program but that, eventually, Student became interested in

- attending a half-day computer-aided drafting program at the vocational education program. (NT at 40-43, 133-141).
15. Student attended the half-day computer-aided drafting program at the vocational education program for the 2008-2009 school year. (NT at 685-686).
 16. Student was evaluated privately in January 2009. (P-10).
 17. On the Gray Oral Reading Test (4th Edition), an assessment of oral reading performance, Student scored at the 2nd percentile in rate, the 5th percentile in accuracy, <1st percentile in fluency. Student scored at the 16th percentile in comprehension, a score described as “adequate” by the expert evaluator “even though Student’s reading was dismal”. (P-10 at pages 9-10).
 18. On the Test of Word Reading Efficiency, an assessment to measure the ability to sound out unfamiliar words and accurately recognize familiar words, Student scored <1st percentile in sight word efficiency and phonemic decoding efficiency. (P-10 at page 10).
 19. The private evaluator recommends a program based on basic skills, including phonics and sight words, fluency, and automaticity. (P-10 at 15-16).
 20. The goals being monitored in the progress monitoring reports produced by the District do not match the goals in the IEPs. (P-4; P-5; P-6; S-13, S-14, S-15).

21. The District presented evidence about Student’s reading performance in the computer-aided drafting class. Student’s written responses to self-check assignments and tests are almost all copied verbatim out of the class materials without any extemporaneous engagement of the text or non-verbatim responses. (S-20, S-21, S-23, S-24).

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

Reading Instruction

To assure that an eligible child receives a free appropriate public education,⁵ an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”⁶ “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning.”⁷ More specifically, a student’s IEP must include specially designed instruction designed to meet the

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

⁵ 34 C.F.R. §300.17.

⁶ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁷ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

unique needs of the child and must be accompanied by any necessary related services to permit the child to benefit from the instruction.⁸

In this case, the District has failed to provide FAPE in its reading instruction. Upon Student's return to the District in the spring of 2006, the District's present level of educational performance for Student's instructional reading level was at approximately a 2.8 level. (FF 3). One year later, by May 2007, Student's instructional reading level was at the 3.1 level. (FF 5). The regular monitoring of instructional reading levels apparently stopped thereafter, as there is only one reading measurement registered by May 2008, at the 4.6 instructional level. (FF 12). There is a demonstrable lack of progress in reading over the fourteen months of instruction between January-May 2006 and September 2006-May 2007. Put simply, Student stagnated at approximately the 2.5-3.0 instructional level for roughly 14 months of instruction. Once Student began the Fast ForWord program, Student's progress improved. (FF 7, 10).

Second, the goals in Student's IEP changed over time, from three (reading level, fluency, comprehension) in May 2006, to two (reading level and comprehension) in May 2007, to one (comprehension) in May 2008. (FF 4, 6, 11). These changes are particularly indefensible given the fact that fluency was a particularly identified need of Student's. (FF 3). There were never any goals in decoding or phonics-based instruction. (FF 3).

⁸ Rowley; Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993).

Third, the District's pattern of assessment and progress monitoring casts doubt on its ability to gauge accurately Student's progress toward Student's goals. In one instance, there is data on quarterly reading assessments that do not appear anywhere in Student's IEPs as benchmark data or present levels of educational performance. (FF 7). In another instance, multiple years of progress monitoring took place for IEP goals that do not exist in any of Student's IEPs. (FF 20).

Accordingly, there will be an award of compensatory education for the District's failure to provide a FAPE as a result of the flaws in Student's reading instruction from January 2006 through May 2007.

Transition Planning

IDEIA mandates that transition services must be part of a student's IEP for the school year in which the student turns sixteen.⁹ Therefore, Student's May 2008 IEP, to be implemented in the 2008-2009 school year, should have included a transition plan. (FF 13).

The District argues that even given this procedural flaw, it is harmless error and should not be the basis of a compensatory education award. This hearing officer disagrees.

Certainly, the degree to which Student's placement at the vocational education program was embraced by Student and Student's family, or the degree to which they felt forced into the program, is

⁹ 34 C.F.R. §300.320(b).

disputed. (FF 14). But the program clearly is geared toward vocational training (in Student's case, computer-aided drafting) and career development. Still, it appears that Student's entry into the program was highly conflicted, and throughout the 2008-2009 school year, Student struggled with a sense of Student's post-secondary planning.¹⁰ And, at least in the mind of Student's mother, much of sense of Student's future was intertwined with Student's deficits in reading.¹¹ The lack of any transition services, "age appropriate transition assessments related to training, education, employment, and....the transition services (including courses of study) needed to assist the child in reaching those goals",¹² is not harmless error in this case; it has impeded Student's ability to plan for and work toward Student's post-secondary life.

Accordingly, there will be an award of compensatory education for the District's failure to provide a transition plan in the May 2008 IEP.

Program Location

As indicated above, the vocational education program location was contested between the parties. Parents seek an prospective order for the location of Student's educational program at [location redacted]. The status of Student's IEP for the upcoming 2009-2010 school year, the 11th grade year, is not a matter of record in this case. As such, an order for a

¹⁰ NT at 177-185, 592-594.

¹¹ NT at 161-163.

¹² 34 C.F.R. §300.320(b)(1-2).

specific location for an educational program of which this hearing officer has no knowledge would not be appropriate. The record in this matter, however, clearly points out the difference of opinion over the program location issues at the May 2008 IEP meeting. Therefore, this hearing officer's order will instruct the parties as to how the IEP team should consider program location without an explicit order as to the location.

Compensatory Education

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student a FAPE.¹³ The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied a FAPE.¹⁴

The U.S Court of Appeals for the Third Circuit has held that a student who is denied a FAPE "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem."¹⁵ In 2006, however, the Pennsylvania Commonwealth Court explicitly rejected the Third Circuit's 'compensatory education equals the period of

¹³ Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992).

¹⁴ Ridgewood; M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996).

¹⁵ M.C. at 397.

deprivation’ calculation.¹⁶ Instead, the Commonwealth Court found “more persuasive and workable”¹⁷ a ‘compensatory education equals an amount for rectification’ calculation— “the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE”.¹⁸

Given this guidance, I will determine when the District knew or should have known it was denying Student a FAPE. Then I will determine the amount of compensatory education necessary to bring Student to the position Student would have been in absent the denial of FAPE.

Regarding the denial of a FAPE for the District’s handling of the reading instruction, the District, having reacquainted itself with Student in January 2006 after being away from the District, could not immediately know that its reading instruction was not effective. Its initial measure, in February 2006, showed Student at the 3.0 instructional level; by May 2006, Student was at a 2.6 instructional level. So, after five months of reading instruction in the District, Student had, at best, made no progress or, at worst, regressed to some degree. By the end of the school year, it seems that the District should have been reconsidering its instruction and/or assessment instruments. By September 2006,

¹⁶ B.C. v. Penn Manor Sch. Dist., 906 A.2d 642 (Pa. Commonw. 2006). Even though B.C. involved a compensatory education award for a violation of a gifted education program, it applies by analogy to a claim for compensatory education for a violation of a special education program.

¹⁷ Id. at 650.

¹⁸ Id. at 651.

Student was at the 2.5 instructional level, and the District should have been deeply concerned that six months of reading instruction was not improving Student's reading; Student was, in fact, regressing. Therefore, it is the considered opinion of this hearing officer that the District knew or should have known by the end of September 2006 that it was failing to provide a FAPE to Student in terms of Student's reading instruction.

Regarding the denial of FAPE for the lack of transition planning in the May 2008 IEP, the District knew or should have known of its explicit obligation under IDEIA to include such planning. As set forth above, the lack of transition planning has denied Student a FAPE in the 2008-2009 school year. Therefore, the entire 2008-2009 school year was affected by the lack of transition planning.

Having established when the District knew or should have known about its failure to provide FAPE in these matters, I must determine the amount of compensatory education necessary to bring Student to the position that Student would have occupied if the District had not denied Student a FAPE. Beginning in October 2006, the District should have been examining all aspects of its reading instruction as to why Student was not making progress, or as the 2006-2007 school year unfolded, up-and-down instructional levels that were all well below the IEP goal of a 3.6 instructional level. It is the considered decision of this hearing officer that 2 hours of compensatory education per instructional day from October 1, 2006 through the end of the 2006-2007 school year

(approximately 160 instructional days) is necessary to remedy that lost year of reading instruction. Furthermore, Student's reading instruction in the 2007-2008 and 2008-2009 school years showed improvement over the 2006-2007 school year. But the flaws in the District's IEP goals, instruction, and progress monitoring still require a compensatory education remedy. It is the considered opinion of this hearing officer that 1 hour of compensatory education per instructional day from the 2007-2008 and 2008-2009 school year (approximately 360 instructional days) is necessary to remedy the deprivations of FAPE over those school years.

The denial of FAPE for a lack of transition services would have been remedied periodic servicing in terms of Student's post-secondary planning. It is the considered opinion of this hearing officer that 2 hours of compensatory education per month for the 2008-2009 school year is necessary to help Student frame Student's post-secondary plans given the fact that Student has only two years of high school left and needs to make vital decisions regarding Student's future.

As for the nature of the compensatory education award, the parents 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 current or future IEPs. 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 parents.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of Student's 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 District professionals who should have provided services to Student.

An award of compensatory education will be fashioned accordingly.

CONCLUSION

The District denied Student a free appropriate public education in the provision of reading instruction and in its lack of transition services in the May 2008 IEP. Compensatory education will be awarded as a result of these denials. Furthermore, the parties will be instructed about the program location for the 2009-2010 school year.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to an award of compensatory education in the amount of 698 hours as follows:

- 320 hours (2 hours per school day from October 1, 2006 through the end of the 2006-2007 school year)
- 360 hours (1 hour per school day for the 2007-2008 and 2008-2009 school years;
- 18 hours (2 hours per month for the 2008-2009 school year).

Furthermore, in planning for the 2009-2010 school year, Student's IEP team shall consider all potential program locations, including the District's high school and the vocational training center. The final decision on the program location, however, shall rest with Student and Student's parents.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

May 28, 2009