

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Appearing on behalf of the Parent: pro se

Appearing on behalf of the Board of Education: Attorney Rachel Kuschel
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Appearing before: Attorney Deborah R. Kearns
Hearing Officer

FINAL DECISION AND ORDER

ISSUES: Whether the parent is entitled to reimbursement for the cost out-of-district tutorial services parent provided for the Student?

PROCEDURAL HISTORY: The parent made a claim for Due Process seeking reimbursement for sums spent on private tutorial services with an out-of-district provider. The matter was consolidated with Case No. 07-352, regarding Student's sibling. It was determined and agreed, the parties could adhere to a format which provides for a separate hearing, record, and decision for the individual students. The parties agreed to extend the date for mailing the final decision to accommodate scheduled hearing dates and briefs. The following witnesses testified at the hearing: Peter Bartoli, Kathy Baird, Brenda Schideler, Maureen Sullivan, Barbara Denver and the parent. The date for mailing the final decision is November 15, 2008.

SUMMARY: The Student was identified as a child in need of special education and related services from the second grade to the eighth grade. He was exited from special education at the parent's request on October 25, 2007. Student earned average to honor-roll grades during the time the Student fully participated in the school district's special education program. In September 2006, Student's parent excused him from attending the resource room portion of his special education program. After seven months and some decline in school performance, the parent enrolled Student in a tutorial program with an out-of-district provider. After eleven months of tutorial service, the Student's grades improved. Student was evaluated seven months after he discontinued the tutorial program. The parent claims the school district should be responsible for the cost of the out-of-district tutor.

FINDINGS OF FACT

1. The parties agree Student is identified as disabled and eligible to receive specialized instruction and services pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 *et seq.*, as amended. Student was initially identified when he was in the second grade. Student was exited from special education at the parent's request on October 25, 2006. (Ex. B-1, B-2, B-3, B-5, B-38, B-39, B-40)
2. A psychological evaluation, dated January 17, 2001, summarizes Student's disabilities. The evaluation concludes Student has a twenty-point discrepancy between his verbal and performance intelligence quotient. Student's score is below proficient in verbal comprehension. Listening comprehension skills are a relative weakness for the Student. Phonological memory indicates a deficiency in the basic skill set required for reading. The evaluator concludes, it is difficult for Student to remember and process information obtained through auditory channels. Student is described as a cooperative, determined, diligent, and persistent worker. Student is reading approximately one year below grade-level. (Ex. B-5)
3. A Speech and Language Evaluation, dated February 2, 2001, concludes Student performs in the low-average range. His receptive and expressive language skills are weak, and can adversely impact his academic learning. He has difficulty with concepts and directions. The difficulty impairs his ability to interpret, recall and execute oral commands of increasing length and complexity. It is difficult for him to form sentences with nouns, verbs, adjectives, adverbs and conjunctions. (Ex. B-7)
4. On Student's sixth grade report card he has honors grades in the first and fourth quarters. Final grades, for core subjects are as follows: Language Arts B, Reading B, Mathematics B+, Science B+ and Social Studies B. (Ex. B-25, P-15)
5. The seventh grade (2005-2006) individualized education program (IEP) provides for Student to have 8.5 hours of special education services delivered in the regular education classes. The IEP provides for 1.5 hours per week of resource room support. One of the IEP goals is to improve Reading and Language Arts while included in the regular education class. Student attends a teacher-assisted class and is given modified work. The class assistant monitors Student's class performance and provides support. (Testimony, Ms. Baird)
6. The special education teacher testified Student is independent in class and asks few questions. Student told the parent the resource room is a homework period. The resource room teacher testified participants work independently when they are able. The teacher is there to provide support when needed. The teacher understands resource room participants may feel stigmatized. The resource room is scheduled during study hall. Student is not removed from his regular education classes to attend the resource room. (Testimony, Parent; Testimony, Mrs. Baird)

7. In the fall of 2005, Student's seventh grade year, he did not attend the resource room regularly. The special education teacher called the parent to discuss Student's attendance. The parent sent the school a letter, dated September 28, 2005, that excused Student from attending classes in the resource room. The parent did not express dissatisfaction with the special education services or attempt to meet with school staff to revise the IEP to meet the Student's needs. The parent testified at the hearing that the Student felt he was in the "stupid" class. The parent believes Student felt stigmatized about being a special education student. The parent wanted to give Student a chance to be more independent in meeting his educational requirements. (Ex. B-27, P-16; Testimony, Mrs. Baird; Testimony, Parent)
8. The IEP was modified on October 4, 2005, to reflect elimination of 1.5 hours per week in the resource room. Student continued his enrollment in the teacher-assisted classes. (Ex. B-20, B-24, B-28)
9. The support provided in the resource room may have been subtle, yet beneficial, to provide Student with support. Student has difficulty with following directions for assignments, and reviewing information obtained through auditory channels. After the resource room program was eliminated from Student's IEP, his grades dropped somewhat. It is found, Student was successful when he participated in the resource room portion of his IEP program.
10. On the Connecticut Mastery Test (CMT) Student Report, dated March 1, 2006, Student's scores are at the basic level in Reading, Writing, and Math. Student's. The DRP score, the measure of Comprehension and Degrees of Reading Power, is 55. The comment about Student's Reading performance states,
"Seventh grade students, who perform at this level, are likely to demonstrate a limited ability to read and respond to grade-appropriate literary, informational, reading-to-perform-a-task text, and require assistance to complete many reading tasks. Students at this level effectively use strategies before, during and after reading to understand and interpret grade appropriate text. Efficient strategy usage may be inconsistent. Students at this level demonstrate a limited ability to analyze words in context and to construct meaning from grade-appropriate text."
(Ex. B-29)
11. Seven months after the Student was excused from attending the resource room, parent and special education teacher had a phone conversation about the child's declining performance in the seventh grade. The parent testified she spoke of her intention to have an out-of-district evaluation. Student began tutoring at an out-of-district program on May 25, 2006. Student attended three tutoring sessions before the end of the seventh grade. There is insufficient detail to the fourth quarter report card, or other data, to conclude that three sessions of tutoring contributed to Student earning honor-roll grades for the fourth quarter. (Testimony, Parent; Testimony, Mrs. Baird, Ex. B-25, P-6)

12. Student's seventh grade report card shows a mixture of A, B, and C grades with one D grade on the entire report card. In the third-marking period, core subject grades are C+, C, C-, B+ and B+. In the fourth quarter, Student earns honor-roll grades with B, B, B-, A, and B+. Report card comments for the first quarter state "needs to work on vocabulary" and "study for tests". The IEP provides for the resource room teacher to coordinate with the classroom teacher to monitor Student's needs and provide support. (Ex. B-24, B-25, B-36, P-18)
13. The out-of-district tutoring program conducted diagnostic assessments to determine Student's current performance levels. As a seventh grader, on the Gray Oral Reading Test-3 (GORT 3), dated April 13, 2006, the Student's grade equivalency scores are Reading Comprehension 5.8 (average); Reading Accuracy 6.5 (below average); Reading Passage 6.1 (below average); Reading Rate 5.8 (below average). Grade Equivalency Performance on the California Achievement Test-5 (CAT-5) is Vocabulary 5.2; Comprehension 5.6; and Total Reading 5.2. The test results were reported in terms of grade equivalency, the evaluation report cautions "results reported as grade equivalent are not expected to equal the classroom grade level". (Exhibit B-35, P-1)
14. The eighth grade IEP, proposed in the spring of seventh grade, plans a triennial evaluation of cognitive abilities and achievement. Student is assigned to a resource room for 1.5 hours per week. The focus is to work on areas of weakness described as introductory paragraphs, responding to prompts, reading comprehension, and vocabulary. Student's regular education is provided in teacher-assisted classes for core subjects. (Exhibit B-28, B-36, B-37, Testimony, Parent)
15. The IEP, dated April 25, 2006, was amended on October 17, 2006, to reflect the parent's request for the Student to be exited from Special Education. The IEP states "Termination of Special Education Services is effective October 25, 2006. The prior written notice portion of the document states the basis for the decision is a May 2004 evaluation, progress reports October 17, 2006, and the parent's request for termination. The PPT team agrees with the parent's request. The triennial evaluation, due for 2006-2007, was not completed because the Student was exited from special education early in the eighth grade. (Exhibit B-38, B-39, B-40, B-41)
16. The out-of-district tutoring program prepared reports of Student's performance before and after he participated in 108 hour of tutoring. Student's CAT-5 performance improved, when compared to the pretest in April 13, 2005. CAT-5 scores are measured in grade equivalencies: Vocabulary 8.2, Comprehension, 8.6, Total 8.2. The evaluation report cautions "results reported as grade equivalent are not expected to equal the classroom grade level". (Ex. B-37, Ex. P-1)
17. The eighth grade Connecticut Mastery Test (CMT) administered March 5, 2007, results are as follows: Reading (below-basic level), Mathematics (basic-level), and Writing (proficient level). Student's Reading level dropped from basic-level in the seventh grade to below basic-level in the eighth grade. Student's eighth grade report

card shows improvement. In the eighth grade, Student made the honor-roll in all quarters except the fourth which he missed by one mark. (Ex. B-29, B-42, B-49)

18. The parent wrote a letter may 6, 2007 to a school administrator. The letter states Student was tested at the Sylvan Learning Center because he was having a difficulty in the sixth and seventh grade with homework, concentration and failed tests. The parent was surprised to learn [Sylvan evaluations conclude] Student's reading level was 2.5 years below grade-level. For eleven months, Student attended a total of 180 hours of tutoring. The out-of-district tutor report states they provided 108 hours of service. (Ex. P-4, P-5, P-18, B-37, B-43)
19. Student's psychoeducational evaluation, dated August 3, 2007, concludes Student has average ability for comprehension, perceptual reasoning, working memory, and processing speed. Student demonstrates he has adequate cognitive ability necessary for academics. The results suggest Student is vulnerable in subjects where he has less confidence. Student has low-average, reading ability, and may have difficulty understanding grade-level reading material. On the WIAT-II, Student performs in the average range on the Reading Composite. Word Recognition is in the average range. Reading Comprehension is in the low-average range, one year below grade-level. It is predicted Student may have difficulty understanding grade-level reading material. In Math, Student's achievement is below-average with skills about one year below grade-level. Student does not show significant differences in his ability and his achievement levels. Concerns are noted for Reading Comprehension; short-term, auditory memory; and both verbal and written expression. (Exhibits B-5, B-17, B-50)
20. Student's IEPs for 2005-2006 and 2007-2007 were developed to address areas of weakness identified by the test results. It is found the Student was able to earn passing marks and some honor-roll grades in the sixth, seventh, and eighth grades. There is no doubt Student's advancement from grade to grade appears to result from earned promotions. Student's IEP provides for appropriate special education instruction and services. Student's attitude, behavior, physical and psychological well being are reported to be appropriate. (Ex. B-9, B-11, B-13, B-16, B-20, B-24, B-28)

CONCLUSIONS OF LAW

1. The Student is identified as a child with disabilities pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 and Section 10-76(a) of the Connecticut General Statutes. There is no dispute between the parties as to the child's eligibility to receive a free and appropriate public education (FAPE). The Student was eligible to receive special education services from the second to the eighth grade. The parent requested Student be exited from special education effective October 25, 2006.

2. The IDEA regulation at 34 C.F.R. 300.17 provides that special education and related services are to be provided at public expense; the education must meet the standards of the state educational agency; the education is in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. 300.320 through 300.324.
3. In Connecticut, Section 10-76h-14 of the Conn. Agencies Regs., assigns to the public agency the burden of proving the appropriateness of the child's program or placement. This burden shall be met by a preponderance of the evidence.
4. Whether a program is appropriate is determined by the two-prong test articulated in *The Bd. of Education of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207 (1982). First, the procedural requirement of IDEA must be met. The parent makes no claim of procedural violations. The second requirement is that the IEP must be reasonably calculated to enable the child to receive an educational benefit. The parent's claim is focused on the educational benefit derived from the individual education plan. The second prong of *Rowley* does not require a program that maximizes the potential of handicapped children, but opens the door of educational opportunity to provide for more than a "trivial advancement", *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998)(quoting *Rowley*, 458 U.S. at 189, 192, and *Mrs. B v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir. 1997)).
5. The IDEA Regulation at 34 C.F.R. 300.101 (c) provides for evaluation of the Student's circumstances. "Each state must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade".
6. The regulation requires objectively evaluating the Student's circumstances. The significant factors follow: Student has a history of success in special education supported classes. He spends most of his time in the mainstream or least restrictive environment. In the sixth grade, Student earned honor-roll grades in the first and fourth quarter, while supported by the district special education program. In the seventh grade, the resource room was removed from Student's program, at the parent's request. Student's Reading grade was a D and C in the first two quarters, but improved by year end.
7. The parent claims she was unaware the Student was below-grade-level in Reading. (Ex.B-43). The Student consistently scored below-grade-level in all standardized tests contained in the school record from the second to the eight grades.
8. If parent was unable to obtain Student's cooperation in attending the resource room classes, or if the Student experienced difficulty with school work, the program could have been revised. The IDEA regulation, 34 C.F.R. 300.324 (a)

- (ii), requires the IEP team to consider the concerns of the parent in the development, review or revision of the IEP. The parent must, however, communicate the Student's needs to the district. Parents often decide it is better to provide more than the school offers to benefit their child. Sometimes a child is more responsive to outside service providers. If the parent believes the IEP program is not appropriate and wants reimbursement, the parent must discuss the problems with the school staff. The time to provide notice of the problem was when the Student was withdrawn from the resource room program, or placed with the out-of-district tutor, not on May 2007.
9. Student receives an educational benefit and makes progress in the LEA's program. The psychoeducational evaluations identify needs which can impact Student's school performance. The IEP provides for appropriate education support in both the regular education class and the resource room.
 10. Student's grades declined in the second and third quarter of seventh grade. At the time in question, the IEP appears to have provided Student with some educational benefit. Seven months later, Student enrolled in the out-of-district tutoring program. The parent claims improved grades are the result of the private tutoring program. It is likely Student benefits from support in the out-of-district tutoring program. The parent has provided a program which clearly benefits the Student and prepares him for a brighter future. It is settled that an LEA is not obligated to provide all that a loving parent may provide to their child.
 11. The LEA's special education program allows Student to benefit from his education, earn passing grades and advance from grade to grade. Report card and evaluation comments consistently state the Student is hard-working, well-behaved, and a delightful student. Nothing in the record indicates there is any difficulty with peer relationships or health. Student's record references participation in extra-curricular programs and sports. The amount of progress Student makes while participating in his IEP program is sufficient under the law.
 12. The Student's school performance improved with the addition of the out-of-district tutoring, but the law does not require a school district to maximize a child's potential. The record shows Student was able to make progress and earn passing grades even after he was exited from special education, even though his grades slipped somewhat.
 13. Whether the LEA is responsible for the cost of the tutorial program when a free and appropriate public education is available through the LEA? It is well established, the IDEA does not require districts to maximize the potential of a student's educational performance. To her credit, the parent provided a tutorial program which resulted in improved school performance. The reason for the improved grades is not entirely clear. The parent testified, the Student made a commitment to improve his grades because the parent was making a financial commitment to provide the tutoring services. The out-of-district tutorial program

may have helped Student, as he matured, to develop strategies to improve school performance. Neither the CMT, dated March 2007, nor the psychological evaluation, dated August 2007, shows much any improvement in standardized test scores for Reading. Despite standardized test results, Student has good school performance. During the 2005-2006 and 2006-2007 school years, Student earned passing grades with or without the supports provided by his IEP. When the parent removed the resource room component of the program, his grades declined. The parent was understandably concerned. Student received an educational benefit and made progress in the LEA's program. The program meets the statutory and regulatory criteria necessary to provide the Student with a free and appropriate public education during the time Student was eligible to receive mandated services.

14. The LEA has sustained its burden, by a preponderance of the evidence, they provide an appropriate special education program for Student. If the LEA's program provides FAPE, there is no authority for a hearing officer to order reimbursement of parent's tutoring expenses.

FINAL DECISION AND ORDER

1. The IEP for the 2005-2006 school year provides the child with a free and appropriate public education.
2. The IEP for the 2006-2007 school year provides the child with a free and appropriate public education.
3. The request for reimbursement for the cost of tutoring services provided by an out-of-district service is denied.