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: A.W.

Date of Birth: [redacted]

ODR No. 01396-1011 JS

OPEN HEARING

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Charleroi Area School District 125 Fecsen Drive Charleroi, PA 15022-2279	Michael Lucas, Esquire Bassi, McCune & Vreeland, P.C. 111 Fallowfield Avenue P.O. Box 144 Charleroi, PA 15022-0144
Date of Hearing:	September 15, 2010
Record Closed:	September 15, 2010
Date of Decision:	September 24, 2010
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a late teen-aged eligible student of the Charleroi Area School District (District). Student is in tenth grade, having failed to complete that grade during the previous school year. (NT 35-7 to 36-22.) The Student is identified as a child with a disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). The Student's exceptionality is Specific Learning Disorder in reading, mathematics and English. (S-3 p. 5.) Student also is diagnosed with leukodystrophy and scoliosis. (S-1.) Student has extensive orthopedic disabilities and utilizes a wheel chair and other devices to navigate in school; Student also requires various specialized nursing and occupational or physical therapy services during the school day to maintain Student's physical health and comfort. (S-1.) Presently Student is recovering from surgery at a rehabilitation facility known to Parent as the [redacted facility] near Pittsburgh. (NT 36-6 to 38-10.)

Parent requested this due process proceeding, appearing pro se, (NT 4-3 to 15), and asserting unspecified complaints about the services provided by the District. (NT 9-16 to 23.) The District denies any failure to provide appropriate educational services, special education or related services.

The hearing was conducted and concluded in one session on September 15, 2010. The record closed that day.

ISSUES[1]

1. Should the hearing officer order the District to provide additional Occupational Therapy and Physical Therapy services, including appropriate orthopedic devices for the Student when Student returns to school after Student's stay in the [facility]?

2. Should the hearing officer order the District to include Parent in the educational planning process through the IEP procedures to the full extent required by law, including listening to and properly considering her concerns, and taking full cognizance of the medical directions of the Student's medical providers?

3. Should the hearing officer order the District to remedy or address in any way the suspension issued in January 2009 for refusal to use the Hoyer lift?

4. Should the hearing officer order the District to remedy or address the District's actions in consulting with and following the directions of the Student's pediatrician regarding the Hoyer Lift in late 2009 or early 2010?

5. Should the hearing officer order the District not to contact medical professionals without the Parent's permission and prior consultation?

6. Should the hearing officer order the District to place matters such as cell phone access in Student's IEP to prevent the Student from being disciplined for use of things such as the cell phone?

7. Should the hearing officer order the District to change its administration of home health care services as they are utilized in the school setting?

8. Should the hearing officer order the District to allow the assigned LPN to advocate for the Student?

FINDINGS OF FACT

1. During the relevant period of time, the District has not excluded the Student from Student's placement for disciplinary reasons for ten days or more. (P-2 p. 3, 4.)

2. The District invited the Parent to participate in all IEP meetings during the 2008-2009 school year, and all IEP meetings for planning for the 2009-2010 school

[1] The Parent did not seek compensatory education for any of the District's failures that she alleged. (NT 110-18 to 111-3.) However, regarding the issues of which I do have jurisdiction, even if the Parent had requested such relief, she presented no facts indicating a deprivation of educational benefit to the Student. Since she had the burden of proof, I would have ruled against the Parent, because she provided no evidence to justify an order for compensatory education.

year. The Parent did participate in IEP meetings and had an opportunity to raise her concerns. (NT 129-9 to 130-6, 130-20 to 132-8, 150-3 to 16, 152-6 to 152-11, 153-9 to 155-23, 198-11 to 202-22.)

3. The District Superintendent provided the Parent with his cell phone number and allowed her to call him with concerns about the Student's educational and medical needs. (NT 131-15 to 132-8.)

4. The Superintendent made significant efforts to facilitate the change in service provider for the Student's home health care aide, who would also provide services in the school. (NT 132-9 to 133-14.)

5. The District consulted with the experts that the Parent designated as medical advisors and providers both at IEP meetings and during the implementation of the IEP. (NT 134-9 to 137-18, 138-24 to 140-23; S-1.)

6. The Student was disciplined for inappropriate use of Student's cell phone, by repeatedly utilizing it during class time despite repeated instructions from the teacher to cease doing so. (NT 160-8 to 161-20; P-2 p. 3.)

7. The Parent had requested that the District allow the Student access to Student's cell phone for purposes of calling the Parent during the school day. Arrangements were made to allow this upon request of the school office; however, these arrangements were not discussed in the IEP meetings prior to January 2008. These arrangements were not reflected in the subsequent IEP, even though the Parent asked that the IEP address the subject of cell phone use. (NT 161-12 to 25, 180-8 to 184-13, 199-21 to 202-22; S-3.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof determines who has to prove the facts in a due process hearing. In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court decided that the IDEA requires the party requesting relief (action by the hearing officer) to prove that the law requires such relief. The Dispute Resolution Manual §810 requires proof by a preponderance of evidence. This means that the party with the burden of proof must provide more evidence than the opposing party to prove all the facts needed to justify an order from the hearing officer. In this case, the

Parent is asking for relief; therefore, the Parent has the burden of providing more evidence than the District, to prove all the facts needed to justify me in issuing an order to the District.

ISSUE 1: OT AND PT SERVICES AND RELATED DEVICES

As to this issue, I ruled at the hearing that it is too early to decide it now. (NT 89-20 to 92-3.) Therefore I dismiss this request for an order, without prejudice. "Without prejudice" means that the Parent will be free to make the same request again, when she knows what the doctors are recommending for the Student when Student returns to school.

I understand that the Parent wants the District to pay close attention to the Parent's input and follow the doctors' orders regarding the Student's physical needs when Student returns to school. However, as I said at the hearing, we do not know what those orders and needs will be. Therefore, I cannot order the District to do anything for the Student at this time.

At the hearing, everyone agreed that, when the Student is ready to return to school, the District will find out exactly what Student's doctors are ordering for Student and consult with the Parent about what she wants for the Student. At that time, the District and Parent will work as a team to make sure that the Student's needs are met while Student is in school. The District will comply with all federal laws concerning the IEP planning process, as well. If all of this does not happen, the Parent can file for due process or seek other assistance.

ISSUE 2: INCLUSION IN EDUCATIONAL PLANNING

I ruled at the hearing that I do have jurisdiction to address Parent's complaints about the district's alleged failure to allow her to participate in the IEP educational planning process. The Parent and the District provided testimony as to the procedures utilized in the IEP process for the October 2009 IEP, which governed special educational services provided to the Student at the time of the hearing and still governs those services. (FF 2, 5.)

I find that the District did include the Parent in the IEP process to the extent required by law. (FF 2, 5.) Therefore, the Parent has failed to provide a preponderance of evidence to show any need for me to order the District to do any more than they have done, or any more than they still promise to do.

The District made an important point at the hearing: the law requires the District to listen to the Parent and consider her input carefully; however, it does not require the District to agree with the Parent all the time. I find that the District made appropriate efforts to consider the Parent's input carefully, as the law requires. (FF 3, 4.) Therefore, I find that no order from me is necessary to assure that the District continue to do so.

ISSUE 3: CHALLENGE TO JANUARY 2008 SUSPENSION

As to this issue, I ruled at the hearing that I do not have the jurisdiction or authority to interfere with discipline unless it keeps the Student out of school for more than ten school days. (NT 92-23 to 93-14.) Discipline that keeps a student out of school for more than ten school days constitutes a "change of placement" under the IDEA, and I am authorized to deal with change of placement if the child has an IEP. 34 C.F.R.

§300.530(b), 300.536(a). That is not the case here, so I dismiss that request for relief. (FF 1.)

ISSUE 4: FOLLOWING THE WRONG DOCTOR'S DIRECTIONS REGARDING THE USE OF A HOYER LIFT

As to this issue, I ruled at the hearing that I do not have jurisdiction. (NT 95-10 to 23.) The issue involves the confidentiality of medical records, which is governed by laws other than the IDEA, and I have no jurisdiction over confidentiality of medical records. In addition, there may be issues regarding educational records privacy, but again I have no jurisdiction over that issue either. Therefore I dismiss this request for relief.

ISSUE 5: ORDERING THE DISTIRCT TO GET PARENT'S PERMISSION BEFORE CONTACTING MEDICAL PROVIDERS

As to this issue, I ruled at the hearing that I do have jurisdiction. (NT 95-24 to 96-4.) I review this issue because it concerns whether or not the District considered the Parent's input and included her in the educational planning for her child. (FF 2.) In this case, I find that the District followed the law and considered the Parent's input sufficiently. (FF 5.) However, in spite of this, the Hoyer Lift was used contrary to the Parent's desires. (FF 6.)

I cannot criticize the District for using the lift at the time because they thought that it was authorized by the Parent, and because it was ordered on the advice of the doctor who the District believed had full authority, and whom they believed they had permission to contact. (FF 6.) Since the District did not fail to follow the law, no administrative order is appropriate.

ISSUE 6: LISTING EXCEPTIONS TO NORMAL SCHOOL POLICY IN THE IEP TO PREVENT INAPPROPRIATE DISCIPLINE

As to this issue, I ruled at the hearing that I do not have jurisdiction. (NT 93-15 to 95-3.) The Parent complained that her child was disciplined for cell phone use in two separate situations: 1) Student was disciplined for using the cell phone in class after the teacher told Student to stop doing so, and 2) Student was disciplined for using the cell phone to call Student's Parent while Student was not in the classroom.

The District has a policy forbidding all students' cell phone use at least in class. I find that the Student had been using the cell phone in class contrary to District policy and Student was disciplined for such use. (FF 7.)

However, the District also admitted that contacting the Parent was recognized as a legitimate use of the cell phone for this Student. There was no evidence as to why Student was disciplined for using the cell phone to call Student's Parent while not in the class room.

There was evidence that the Parent sought to have the cell phone policy addressed in the IEP, but it was not addressed in that document. (FF 8.) The District did not explain why this did not happen; thus, there is no evidence that the District disagreed with the Parent about addressing the issue in the IEP.

On this record, I find that there was no inappropriate deviation from a reasonable accommodation of the Student's physical needs – that Student be allowed to use the cell phone, not in class, to call Student's mother as needed. (FF 8.) While the District failed to address the issue in the IEP, as requested by the Parent, there is no evidence as to why. Since the District was willing, and deemed it appropriate, to provide for cell phone use

for this Student, I see no reason why such accommodation – and any other accommodation to school disciplinary rules based upon the Student's disabilities – should not be reflected in the IEP as the Parent requested.

However, there is a basic problem with making such a ruling in this case. The record never revealed that the Student was identified with a disability related to Student's orthopedic diagnoses. Nor did the record reflect why it was necessary for the Student to be able to call home – that is, why the Student's disability made it necessary for Student to be able to call home during the school day. On this record, I find that the parent has failed to provide enough evidence to prove that the District violated the law by not including this information in the IEP. Since the Parent bears the burden of proof, as described above, the Parent cannot prevail on this issue.

Although I will not order this issue to be provided for in the IEP, I must urge the parties to consider this, and all deviations from typical enforcement of the District's code of student conduct, in the IEP planning process that will begin when the Student is ready to return to school. Although, because of lack of evidence, I do not find that the law requires the District to include such accommodations in the IEP, I suggest that it is worth considering seriously.

ISSUE 7: HOME HEALTH CARE SERVICES

As to this issue, the Parent withdrew her request for relief during the hearing. (NT 124-6 to 126-9.) Therefore, I dismiss that issue.

ISSUE 8: LPN PERMITTED TO BE AN ADVOCATE

As to this issue, I ruled at the hearing that I do not have jurisdiction, (NT 96-25 to 99-3), for two reasons. First, the LPN is not an employee of the District, and I cannot enter an order affecting a medical services agency that is not a local educational agency. Second, I do not have jurisdiction to order agencies as to how to manage or supervise their employees. I can order the agencies to deliver appropriate services and to provide appropriately trained employees, but the Parent is not asking me to do that. She is asking me to supervise the employees, and that I cannot do. Therefore I dismiss this request for relief.

Although I dismiss the request, the Parent should note that the District at the hearing agreed that the LPN should be allowed to give his opinion if he or she has one on any concern that the Parent raises at the IEP meeting. (NT 108-24 to 110-6.) So even if I could issue an order (I rule that I have no authority to do so), I would be ordering exactly what both parties agree to be the case: the LPN should be allowed to speak his or her mind about the Parent's concerns at the IEP meeting.

CONCLUSION

For the reasons set forth above, I do not find any violation of the law by the District, and I decline to order the District to do what the Parent is requesting.

ORDER

1. The hearing officer declines to order the District to provide Occupational Therapy and Physical Therapy services, including appropriate orthopedic devices for the Student when Student returns to school after Student's stay

in the [facility], and dismisses this request without prejudice because it is premature.

2. The hearing officer declines to order the District to include Parent in the educational planning process through the IEP procedures, including listening to and properly considering her concerns, and taking full cognizance of the medical directions of the Student's medical providers.

3. The hearing officer declines to order the District to revisit the January 2009 suspension for refusal to use the Hoyer Lift, and dismisses the request for relief, because the hearing officer does not have jurisdiction.

4. The hearing officer declines to order the District to revisit the District's actions in consulting with or following the directions of the Student's pediatrician regarding the Hoyer Lift, and dismisses the request for relief, because the hearing officer does not have jurisdiction.

5. The hearing officer declines to order the District not to contact the Student's medical professionals without the Parent's permission and prior consultation.

6. The hearing officer declines to order the District to place in the Student's IEP any individualized procedures that could expose the Student to disciplinary action, such as cell phone usage.

7. The hearing officer declines to order the District to change its administration of home health care services as they are utilized in the school setting and dismisses that request for relief, because the Parent withdrew that request for relief at the hearing.

8. The hearing officer declines to order the District to allow the assigned LPN to advocate for the Student, and dismisses that request for relief, because the hearing officer does not have jurisdiction.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

September 24, 2010