

This is a redacted version of the original hearing officer decision. Select details may 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

DUE PROCESS HEARING

Name of Child: M.M.
ODR #5895/05-06 AS
Date of Birth: xx/xx/xx

Date of Hearing: January 9, 2006

CLOSED HEARING

Parties to the Hearing:

Parent

Representative:

Pro Se – Did not appear

Stroudsburg Area School District
123 Linden Street
Stroudsburg, Pennsylvania 18360

Daniel Corveleyn, Esquire
Newman, Williams, et al.
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Date Transcript Received:

January 12, 2006

Date of Decision:

January 22, 2006

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old eligible student who resides in the Stroudsburg Area School District (hereinafter District). He is currently classified as a student with an Other Health Impairment (Attention Deficit Hyperactivity Disorder).

Because of some incidents involving Student and other students in early February 2005 and into March 2005, Student began receiving homebound instruction on March 22, 2005 at the request of the Parent and under the prescription of a psychiatrist who had evaluated Student in January 2005. Although on April 14, 2005, the psychiatrist notified the District that Student could return to school, the Parent dropped this physician and filed another application for homebound instruction under another provider. Pursuant to the requests of a third subsequent health provider, Student continues to receive homebound instruction.

An IEP meeting was held in April 2005; the Parent attended this meeting for a short time, leaving before the IEP was completed. On April 12, 2005 the District issued a Notice of Recommended Educational Placement (NOREP) which the Parent did not approve, instead requesting a due process hearing. A prehearing conference was convened on May 6, 2005 and based on representations by counsel for both parties that the issues were being worked out and a hearing was not needed the matter was dismissed without prejudice.

Following the completion of the District's evaluation and an agreed-upon psychiatric evaluation the parties and their attorneys met again on August 11, 2005 at which time the Parent produced a new report from a psychiatrist who diagnosed Student with Asperger's Syndrome. As this was new information, the District offered and the Parent agreed to allow a psychologist from the IU and a behavior specialist, both of whom were familiar with Asperger's Syndrome, to evaluate Student. The Parent's attorney supported the evaluation. The IEP team met again at the end of August, an IEP was proposed, but again a NOREP was not approved.

On September 28, 2005 the Parent, now unrepresented by counsel, requested a due process hearing, stating that she disagreed with the most recent evaluation and IEP and that she also withdrew her consent for the IU psychologist and behavior specialist to evaluate Student.

Procedural History

The Parent's hearing request was received at ODR in mid-October and per IDEIA timelines a hearing was scheduled for November 11, 2005. Two resolution meetings were scheduled, but the Parent cancelled and/or failed to attend both meetings. On or about November 2, 2005 the Parent requested and this hearing officer granted a continuance for the purposes of the Parent's finding new legal representation and having

time to receive a document she was awaiting. The hearing was rescheduled for January 9, 2006. Prior to the hearing date the Parent telephoned the hearing officer directly or left a message with ODR for the hearing officer to call her on three separate occasions¹. The Parent called because she perceived that the District was forcing her to discuss/accept a settlement and/or because she believed the District was forcing her to pick up the disclosure documents. On Monday morning January 9th, when the hearing officer was approximately 95 miles away from her home base and quite close to the District, she retrieved a message from ODR that the Parent had called the ODR office on Sunday afternoon (the day before) leaving a message for the case manager that she needed a continuance because she did not receive the District's disclosures in a timely manner and because she had an abscessed tooth. The hearing officer telephoned the Parent, who referenced not receiving the disclosures five days beforehand but did not reference her abscessed tooth until the hearing officer brought it up. The hearing officer informed the Parent that she was denying the continuance request, encouraged the Parent to attend the hearing, and told the Parent that the hearing definitely would proceed whether or not she attended. The Parent did not attend the hearing and the case proceeded without her.

As the Parent did not attend the hearing to state her concerns, and the District did not move to dismiss, the hearing officer articulated a broad set of issues that are presented below. The District assented to these issues on the record. (NT 19)

On January 18th ODR contacted the hearing officer and told her the Parent had called and asked if the hearing officer would call her. Instead, the hearing officer asked ODR to tell the Parent that she should put any concerns she had into writing. On January 21st the hearing officer received a letter from the Parent dated January 19th. That letter and the hearing officer's response were entered into the record as HO-1.

Scope of the Hearing

Pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA) also known as IDEA 2004 Parents may request a hearing within two years of their having reason to believe their child has not received FAPE. The Parent requested this hearing on September 28, 2005 and ODR received the request in mid-October, established by the hearing officer as October 15th as the exact date is unavailable. Therefore the potential compensatory education recovery period to which Student could be entitled would be from October 15, 2003 to October 15, 2005. However, as Student began to receive homebound instruction at the Parent's initiative on March 22, 2005 and there was no indication from the Parent or from any evidence suggesting that the District failed to provide appropriate homebound instruction, the potential recovery period is from October 15, 2003 to March 21, 2005.

¹ November 18th, December 29th and a third unrecorded date during the first week in January.

Issues

1. Did the District offer Student a free appropriate public education (FAPE) under his pendent IEP?
2. If the District did not offer Student FAPE is he entitled to compensatory education and in what amount?
3. Is the District currently offering Student FAPE as articulated in the most recent IEP draft?
4. If the District is not offering Student FAPE should the District be required to place him in a private school at public expense?

Findings of Fact

1. Student is a [teenaged] eligible student residing in the District.
2. Pursuant to an initial evaluation completed on November 5, 1997, and subsequent reevaluations dated November 11, 1999 and October 3, 2002, Student was classified as having an Other Health Impairment (ADHD) and received special education learning support services. (NT 23-25; S-1, S-2, S-3)
3. An IEP was prepared on November 5, 2004, when Student was in 10th grade. (NT 26; S-4)
4. Although the November 5th IEP notes that Student had below level reading skills there are no goals and objectives regarding reading and no specially designed instruction such as a structured reading program to bring him up to age and grade level. (S-4)
5. Following a change in case managers, another IEP was completed on December 9, 2004. (NT 27-28; S-5)
6. The December 9th IEP does contain a goal and two objectives addressing reading. However there is no baseline, and this IEP does not provide for specially designed instruction to address Student's reading deficits in a structured reading program so that he can increase his skills to the 10th grade level as per the goal. (S-5)
7. During the fall of that school year (2004-2005) Student had accumulated a number of medically excused absences from school, reportedly because of changing/adjusting medications. (NT 32)

8. On January 19, 2005 Dr. S completed a psychiatric evaluation report on Student, providing a diagnosis of ADHD that comported with Student's previous diagnoses. Dr. S was the physician who was prescribing and monitoring Student's medication at the time. (NT 31-32; S-6)
9. Another IEP meeting was convened on February 3, 2005 and at the Parent's request a single change was made that provided for bi-weekly progress reports to be sent home to the Parent. (NT 29-30; S-5)
10. On February 4, 2005 the Parent signed a Permission to Evaluate at the District's request. The purpose of the evaluation was to determine appropriate special education services in light of Dr. S's recent psychiatric evaluation. (NT 31; S-7)
11. Beginning in late March Student began receiving homebound instruction following a fighting incident in which he was involved [redacted]. The Parent believed that Student was not safe in school. (NT 32)
12. The District convened an IEP meeting on April 8, 2005. The Parent submitted written information prior to the meeting. (NT 32-34; S-8, S-9)
13. At the meeting the Parent brought up the issues of Student's school absences, his discipline record, his safety in school and his return to school. She left the meeting after about a half-hour. (NT 34-35)
14. Before exiting the meeting the Parent left some handwritten notes she had made. (NT 35-36; S-11)
15. The IEP team continued the IEP meeting for another hour and developed an April 8, 2005 IEP and an April 12, 2005 Notice of Recommended Educational Placement (NOREP). (NT 34-35, 37; S-10, S-14)
16. The District communicated with Parent by follow-up letter, addressing the information in her handwritten notes, and offering to reconvene the IEP meeting. (NT 36-37; S-12)
17. The Parent disapproved the NOREP and told the District she was going to request a due process hearing.² (NT 37)
18. There was a Pre-hearing Conference on May 6, 2005. An attorney for the Parent and the present attorney for the District participated. The group noted that the District's ER would be finished in a few days, that the District was going to consult with Dr P who saw Student privately and also consulted for the District to obtain information about Student's ADHD and treatment recommendations, that

² This hearing officer had been assigned to that matter and recalls that the attorneys for the parties, Daniel Corveleyn for the District and Angela Murphy for the Parent, asked that the hearing be dismissed as the parties were resolving the case through IEP meetings to follow a reevaluation.

- Student's welding competencies would be explored, that the District would do some exploration about the [Redacted] School which Parent mentioned as a possibility for her son, and that there would be an IEP meeting to review the new ER and to revise the IEP. (S-23)
19. The District completed an evaluation on May 6, 2005. The evaluator found that according to the K-TEA-II³ Student had considerably below age and grade level written expression skills and below age and grade level math skills. At that time, reading skills were below age and grade level but not markedly so. (S-20)
 20. The May 2005 evaluation utilized the Connors' Teacher Rating Scale to examine Student's behaviors at school. Three teachers completed the Connors. The results of analysis of the teachers' endorsements on survey items indicated that Student is "markedly to moderately atypical" in the clinical (DSM-IV)⁴ Hyperactive-Impulsive category as well as being "markedly atypical" in the Social Problems category. (S-20)
 21. The May 2005 evaluation recounts Student's statements about his serious social difficulties including peer harassment at school and at the career institute. (S-20)
 22. There was an IEP meeting on August 11, 2005. At this meeting, attended by the Parent's attorney, the Parent presented the District with a document dated July 25th (2005) from Dr. D of [redacted facility] wherein this psychiatrist diagnosed Student with Asperger's Disorder. (NT 49; S-27)
 23. Dr. D made educational recommendations that ranged from "a small structured setting providing emotional support and guidance and offering a low teacher/student ratio" to "enroll[ment] in a school which focuses on individuals who have underlying Asperger's syndrome" to "homebound instruction [in the event that a specialized school was not available]". (S-27)
 24. At the August 11, 2005 IEP meeting, given Dr. D's report, the District offered to have an IU psychologist, Dr. C, who is familiar with Asperger's Disorder, evaluate Student. The District also offered to involve a behavior specialist, Mr. P, who was thought to have relevant expertise. The Parents' attorney endorsed the evaluation by Dr. C and Mr. P. (NT 51, 53; S-42)
 25. The Parent agreed to the evaluation by Dr. C and Mr. P. (NT 52)
 26. As there was no IEP completed on August 11th, on August 22, 2005 the IEP team reconvened, again with Parent being represented by counsel. The draft IEP that had been presented and rejected in April 2005 was used as a basis to develop an IEP as school was about to start. (NT 53-54)

³ Kaufman Test of Educational Achievement, Second Edition.

⁴ Diagnostic and Statistical Manual, Fourth Edition.

27. The IEP team members, including the Parent's attorney were focused on having the Parent allow Student to return to school. (NT 54)
28. The Parent maintained that Student should be in a private school or, in the alternative, on homebound instruction. (NT 54)
29. The IEP meeting ended without an IEP being developed; the proposed IEP is still a draft based on the April 2005 IEP. (NT 54; S-28)
30. By letter dated September 28, 2005 the Parent, now unrepresented by counsel, withdrew her permission for an evaluation by Dr. C and Mr. P, and expressed her disagreement with the last evaluation, with the contents of the draft IEP and with any recommendations of the IEP team. (NT 56-57; S-34)
31. Student remains on homebound instruction, with the most recent requests being submitted over Dr. D's signature. The mental conditions listed on the Homebound Instruction Request are ADHD and Asperger's. (S-30, S-31, S-33)
32. Dr. C, who saw Student for an evaluation on September 15, 2005, found that Student did not meet the criteria for Asperger's Disorder. (S-43)
33. Dr. C does not believe that alternative schooling on the basis of diagnosis is appropriate for Student. (S-43)

Discussion and Conclusions of Law

Legal Basis

Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an IEP. An appropriate IEP follows from an appropriate evaluation.

IDEA 2004 provides, at Section 614(b) (2) that

In conducting the evaluation the local educational agency shall

Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including

Whether the child is a child with a disability; and

The content of the child's individualized education program

Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEA 2004 at Section 614(b) (3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child

Are selected and administered so as not to be discriminatory on a racial or cultural basis;

Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;

Are used for purposes for which the assessments or measures are valid and reliable;

Are administered by trained and knowledgeable personnel; and

Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Following an appropriate evaluation, an appropriate IEP is one that meets the procedural and substantive regulatory requirements and is designed to provide meaningful educational benefit to the child. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit “must be gauged in relation to the child’s potential.”

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... (Emphasis added) 34 CFR §300.347(a) (1) through (4)

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989).

In determining the educational placement of a child with a disability...each public agency shall ensure that unless the IEP of a child with a disability requires some other arrangement, a child is educated in the school that he or she would attend if nondisabled. 34 CFR §300.552(c) Each public agency shall ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled; and that special classes, separate schooling, or removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.550(b) (1) and (2)

The Parent requested this hearing, and as per the United States Supreme Court decision in Schafer v. Weast, 1005 WL 3028015 (U.S. Nov. 14, 2005) that the burden of persuasion rests with the party bringing the claim in special education cases, the Parent bore the burden of persuasion. Although the Parent did not appear, the hearing officer examined the documents and testimony presented by the District in light of the Parent's having the burden.

Discussion

Did the School District offer Student a free appropriate public education (FAPE) under his pendent IEP?

The pendent IEP, that of December 9, 2004, and its immediate predecessor, the November 5, 2004 IEP do not address Student's deficits in reading. The November 5th IEP mentions reading deficits but contains no goals and objectives and no specifically designed instruction to address reading. (FF 4). While the December 9th IEP does contain a reading goal and objectives, there is no baseline from which to measure progress and there is no specially designed instruction that provides a structured reading program. (FF 6). Therefore, this hearing officer concludes that the District did not offer Student FAPE in the area of reading under his pendent IEP.

If the School District did not offer Student FAPE is he entitled to compensatory education and in what amount?

As it has been determined that the District did not offer Student FAPE in the area of reading, he is entitled to compensatory education. The period of potential recovery in this case is from October 15, 2003 through March 21, 2005. The District did not introduce the IEP that was in effect prior to the November 5, 2004 IEP. The Parent failed to attend the hearing and therefore did not introduce documents into evidence. Therefore it is impossible for the hearing officer to determine whether Student's previous IEP was appropriate. Since the United States Supreme Court issued its decision in *Weast* on November 14, 2005 the burden of proof in special education cases shifted from a school district to the Parent when the parent has asked for a hearing. Accordingly the Parent in this case bore the burden of proof and, having failed to attend the hearing and to produce documents for entry into evidence⁵, she forfeited her opportunity to prove that Student's educational program prior to November 5, 2004 was inappropriate. Therefore, this hearing officer concludes that the District failed to provide Student with FAPE from November 5, 2004 through March 21, 2005. He is entitled to compensatory education in the amount of one hour per day for each day that he attended school within that time period; days he was absent, whether excused or unexcused, will not be counted in this calculation.

Is the School District currently offering Student FAPE as articulated in the most recent IEP draft?

The IEP team has not finalized a draft of an IEP for Student and therefore this question cannot be answered at this time. It is clear, given the reported diagnosis of Asperger's, that the District needs to conduct its own evaluation and that the evaluator must be familiar with Asperger's Disorder. If indeed Student has Asperger's, an autistic spectrum disorder, his programming will need to include social skills training, speech/language therapy to assist with developing reciprocal communication, and guidance counseling (not meant to be an exhaustive list) in addition to addressing Student's academic skill deficits in written communication and math and his organizational and impulse control skills. Although his last evaluation in May reported that he does not have a deficit in reading, it is necessary that this be verified by a reading specialist given that he previously evidenced such a deficit. While Dr. D's descriptions of Student may correspond in some respects with a picture of a student with Asperger's, this hearing officer must respectfully disagree with his recommendations for a private school, and especially, for homebound instruction. Asperger's students are being successfully

⁵ The District introduced one of the documents the Parent brought in her disclosure packet as S-43.

educated in public schools all over the commonwealth and it is likely that Student could also be successfully educated in school with the appropriate supports and services.

If an evaluation finds that Student does not meet the criteria for Asperger's, and it is noted that in a document dated September 19, 2005 and supplied by the Parent to the District in preparation for this hearing that pediatric psychologist Dr. C believes that he does not (FF 32), his IEP still must include goals, objectives and specially designed instruction to address deficits in academics, in organization and in communication/socialization.

In order to develop an appropriate IEP for Student and to fashion an appropriate placement it is necessary that he receive an evaluation from an individual who is rooted in the educational field. This hearing officer believes that Dr. C, in conjunction with Mr. P, will be able to provide an appropriate evaluation. Although this hearing officer finds that the evaluation completed by the District in May 2005 is absolutely appropriate and meets all the criteria for evaluations set forth in federal and state law, the new information provided by the Parent necessitates that the District take another look at Student in order to provide a solid basis for his IEP.

Therefore, although the latest evaluation is appropriate, another evaluation including Dr. C, Mr. P, a reading specialist and a speech/language therapist must be completed and this will be so ordered.

If the School District is not offering Student FAPE should the District be required to place him in a private school at public expense?

When the Parent withdrew her permission for Dr. C and Mr. P to evaluate Student, and declined to participate in developing an interim IEP, she denied the District the opportunity to provide an appropriate program and placement for Student. Furthermore, by the Parent's continuing to seek mental health providers who will recommend that Student remain on homebound instruction it is likely that Student's difficulties with socialization are being more deeply entrenched.

A student is entitled to be educated in the least restrictive environment necessary for him to make meaningful educational progress. Although not as far along on the continuum of restrictiveness as one to one instruction at home (in Student's case delivered as "homebound instruction" for medical reasons, not special education "instruction in the home") a private school is far along the continuum, and is not likely to be an appropriate placement for Student. It is notable that Dr. C, the pediatric psychologist whose report the Parent supplied to the District for this hearing, believes that, "there is no reason to recommend an alternative school placement for Student based on diagnosis alone". Once the evaluations are completed, it is the prerogative of the IEP team to select Student's placement. This hearing officer will not order a private school as there is little indication given current data that a private school is necessary and no evidence regarding the particular school the Parent has suggested.

By way of dicta, this hearing officer urges the District to seek a second opinion regarding whether or not Student qualifies for homebound instruction before approving another request. Given his age and his need for social skills development it is inappropriate that he continue to be educated at home if his medical excuse rests upon ADHD and/or Asperger's Disorder.

ORDER

It is hereby ORDERED that:

1. The School District did not offer Student a free appropriate public education (FAPE) in the area of reading under his pendent IEP during the period from November 5, 2004 through March 21, 2005.
2. As the School District did not offer Student FAPE in the area of reading he is entitled to compensatory education for the period from November 5, 2004 through March 21, 2005 in the amount of one hour per day for each day that he attended school within that time period; days he was absent, whether excused or unexcused, will not be counted in this calculation. The compensatory education shall be chosen by Student and his mother and may be used for any educational, tutorial, therapeutic or developmental service that furthers the goals of his IEP. The hours may be used singly or in blocks, in the evenings and on weekends or in the summer, but must be used by the time he turns twenty-one. The District may not set a specific reimbursement schedule for the services, but rather must pay the usual and customary rate in the geographic area for these services when they are obtained by a parent for a child. The total cost of the services under this award must not exceed the total cost the District would have incurred in salaries, benefits and other costs associated with providing the service had it provided the service that is a specific reading program to address Student's reading deficits.
3. Due to the Parent's conflict with the District, the School District cannot currently offer Student FAPE as an IEP has not been completed due to the lack of an evaluation to determine whether or not he is a student with Asperger's Disorder. Therefore within 45 days of receiving this order, the District in conjunction with the IU shall complete an evaluation of Student. This evaluation is to be done by Dr. C, Mr. P, a reading specialist and a speech/language therapist at a minimum; the Parent's permission is not required.
4. Once the evaluation has been completed the District must convene an IEP meeting to develop an IEP for Student. The IEP must in all respects comport with federal and state regulations. Should the Parent not participate, or leave the meeting before the IEP is completed, the District shall complete the IEP without the Parent.
5. Whether Student should be placed in a private school at public expense is a decision that at this point belongs to the IEP team once the evaluation is completed and the IEP is finished. In deciding where to place Student, the District must consider the least restrictive environment necessary and proceed from the presumption that he will attend the school he would be attending if he were not disabled.

January 22, 2006

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer