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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

6045/05-06 AS
File Number

J.N.
Child's Name

Xx/xx/xx
Date of Birth

12/28/05
Date of Hearing

Closed
Type of Hearing

For the Student:

Parents

For the South Western School District:

Dr. Dion Betts
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South Western School District
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Date of Hearing:	December 28, 2005
Date of Receipt of Transcript:	January 2, 2006
Date of Decision:	January 16, 2006
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a/an xx year old resident of the South Western School District (School District) whose parents, while acknowledging that Student needs both special education and related services, desire to receive only learning support special education services from the School District. They want to provide privately-secured related services themselves, and they want me to determine that the School District will not provide related services. For the reasons described below, I find for the School District.

ISSUES

Whether or not Student's current individualized education program (IEP) must include, during the school day, the related services of vision services, occupational therapy (OT) and physical therapy (PT).

FINDINGS OF FACT

1. Student is a/an xx year old resident of the School District with cerebral palsy. Student does not process information as quickly as other children and he is delayed in comparison to other children. (N.T. 155) ¹ He has decreased strength, balance and mobility, he can maneuver his own wheelchair, he can sit independently in a chair or on the floor, and he is learning to walk independently with a walker. In a classroom full of children, he needs safety supervision. (N.T. 26) Student receives behavioral specialist services in the classroom through a county mental health/mental retardation (MH/MR) agency's wraparound program. (N.T. 116)

2000-2001, 2001-2002, 2002-2003 (Pre-Kindergarten Years)

2. During the middle of the 2000-2001 school year, when Student turned xx years old, he attended a specialized classroom operated by the [redacted] Intermediate Unit (IU). (N.T. 105) His IU-provided physical therapist was S.C. (N.T. 105) When Student's parents complained that S.C. had physically stretched Student to the point of tears and crying and screaming, they verbally requested the IU to stop providing PT services. (N.T. 106) IU granted that request and did not ask for that request to be made in writing. (N.T. 107-108)
3. The following school year, 2001-2002, Student attended a Head Start classroom. His IU-provided physical therapist was R.G., and his full time preschool classroom aide was Ms. K. (N.T. 41-42, 55-56, 108)
 - a. Ms. K. testified that, during one PT session, [an incident occurred]. (N.T. 43) When Student's parents verbally requested the IU to stop providing

¹ References to SD, P and HO are to School District, Parent and Hearing Officer exhibits, respectively. References to N.T. are to the transcript of the December 28, 2005 hearing.

PT services, IU granted that request and did not ask for that request to be made in writing. (N.T. 55, 108-109) Student did not receive any school-based PT for the remainder of that school year, while his parents privately secured home-based PT services for Student. (N.T. 55-56)

- b. Ms. K. also testified that Student's IU-provided speech therapist during that 2001-2002 school year was M.Q., who tended to snap her fingers in Student's face in order to get his attention, and who told Ms. K. that Student would never be able to speak. (N.T. 44, 45, 48) M.Q. worked briefly with Student and then she was replaced. (N.T. 47)
 - c. Ms. K. testified that no similar PT or OT incidents occurred during the following, 2002-2003, school year. (N.T. 47)
4. During the 2002-2003 school year, Student's parents obtained a private OT evaluation that recommended using the Writing Without Tears program. When they asked Student's IU OT to provide that program to Student at school, however, Student's IU OT refused. (N.T. 51)
 5. On May 14, 2003, the IU and Student's parents developed an IEP for Student's transition to kindergarten three months later, in August 2003. (N.T. 120; SD 3)

2003-2004 School Year – Kindergarten

6. Apparently, Student did not begin attending the School District's kindergarten until around December 2003. (SD 6)
7. On April 30, 2004, the School District and Student's parents developed an IEP for the remainder of the school year and for summer 2004. (SD 4; N.T. 121, 122)
8. In June 2004, the [redacted] Institute conducted an OT and neuropsychological assessment of Student at School District expense. (SD 2, p.7; SD 6, p. 2)

2004-2005 School Year, Transition Grade K-1

9. On August 23, September 10, and September 22, 2004, the parties met to develop an IEP with the assistance of an independent IEP facilitator. (SD 6, p.3; SD 2, p.3; N.T. 123) That IEP provides:
 - a. 60 minutes of learning support services every two weeks; (N.T. 126)
 - b. 60 minutes of PT every week, and 30 minutes per week PT consultation; (N.T. 127)
 - c. 60 minutes of speech and language services every week, plus one 30 minute session per cycle; (N.T. 128)
 - d. 30 minutes of vision support twice per month; (N.T. 128)
 - e. Transportation and a full time personal aide. (128-130)
10. Student began the 2004-2005 school year at his regular public school, in a transition class between kindergarten and first grade.

- a. After about one month, Student's parents removed Student from public school and enrolled him in a private school. (N.T. 94, 103, 110)
- b. For the remainder of the school year, Student received no school-based PT, OT or vision services, receiving any such services privately at home instead.
- c. Student's private school implemented all parental recommendations regarding any accommodations to Student.
- d. Student's parents found this arrangement to be satisfactory. (N.T. 110)

Summer 2005

11. During Summer 2005, the School District provided ESY services to Student. (N.T. 123-124) Student's parents denied, however, School District requests for private school records and for permission to update Student's present education levels. (N.T. 124)
12. Also during the summer, the parties were involved in a due process hearing over whether or not Student had received a free and appropriate public education during the 2004-2005 school year, and whether or not Student's parents were entitled to tuition reimbursement. (SD 6; P 30; N.T. 83-84, 104)
13. On August 10, 2005, the parties settled one of their due process issues by agreeing to 12 hours of compensatory education PT services. (SD 1, p.3; N.T. 140)

2005-2006 School Year, First Grade

14. On the first day of school, the School District sent a special bus, designed for students in wheelchairs, to pick up Student. (N.T. 72) In contrast to past years, when bus aides allowed Student's parents to walk Student up the bus steps and to get him situated, the 2005-2006 bus aide was unwilling to accept any assistance or advice from Student's parents. (N.T. 72, 73, 75) Student's Parents then asked the School District to stop providing transportation services to Student. (N.T. 69-70) The School District appeared to have no objection to this request, asking only that the request be made in writing. (N.T. 70; P 14)
15. On or about September 2, 2005, the parties attempted to develop another facilitated IEP. (N.T. 112-113) On that date, Student's Parents asked the School District to discontinue OT and PT services. (N.T. 61; P 17; P 21) They reiterated their request on September 7 and 23, 2005. (P 17; P 21)
16. On or about September 7, 2005, Student's parents also requested that Student not be pulled from his classroom for speech therapy, and they asked that Student receive only push-in or observation-only speech therapy services. Student's parents similarly requested that Student's learning support services not be pull-out services. (P 21)

17. On or about September 8, 2005, the parties agreed that the School District would provide “observation and consultation-only” related services, which were intended to be “very low key, no hands-on.” (N.T. 63; P 22)
18. Also on September 8, 2005, Student’s parents revoked all permission for the School District to send, communicate, receive or discuss Student’s medical/educational information with IU. (P 22) Student’s parents reiterated this revocation of permission on October 15, 2005. (P 24)
19. On September 15 and November 9, 2005 (P 7), the state Office for Dispute Resolution (ODR) informed Student’s parents that the School District elected not to utilize voluntary mediation. (P 7; P 16)
20. On or about September 21, 2005, parties had a meeting at which they agreed that they did not want to continue arguing for the next twelve years. School District officials asked Student’s parents what issues they absolutely would not budge on. Student’s parents stated that they wanted IU therapists removed from Student’s program. (N.T. 96, 104)
21. On October 6, 2005, Hearing Officer Romberger issued her decision regarding the 2004-2005 school year. (SD 6) She held:
 - a. That Student’s parents were not entitled to tuition reimbursement;
 - b. That the IEP offered in September 2004² was inappropriate because it lacked a goal relating to wheelchair use in the classroom;
 - c. That the School District failed:
 - i. To provide adaptive equipment;
 - ii. To train Student’s aide appropriately; and
 - iii. To make Student’s classroom wheelchair accessible;
 - d. That the School District did not fail:
 - i. To consider parental input regarding delivery of pull-out services;
 - ii. To grant parental requests for an IEP meeting;
 - iii. To allow Student’s parents to observe in class and during therapies
 - e. That the School District should:
 - i. Provide advance lesson plans to Student; and

² Hearing Officer Romberger’s October 6, 2005 Order actually refers to “the IEP offered in September, 2005.” I find, for purposes of my decision, however, that this was a typographical error intended to refer to the September 28, 2004 IEP. (SD 2) I make this finding because: 1) the record in this case does not include a September 2005 IEP – if a September 2005 IEP exists, I have not seen it; 2) the issue in Hearing Officer Romberger’s case was whether Student was denied FAPE during 2004-2005 due to “problems with the IEP,” which suggests that the IEP at issue in that case was the September 28, 2004 IEP, and not a September 2005 IEP; and 3) Hearing Officer Romberger’s findings of fact do not describe a September 2005 IEP, but they do describe the September 28, 2004 facilitated IEP.

- ii. Consider parental input regarding service delivery, but the School District is not required to comply with parental requests;
 - f. That Student does not require a behavioral specialist; and
 - g. That communication offered between the School District and Student's family was reasonable.
- (SD 6)
22. On or about October 15, 2005, Student's parents informed IU that they did not want Student to receive school-based related services anymore. (N.T. 68; P 24; P 25)
23. In early November, the School District decided that it would no longer provide observation-only or consultation-only services, but rather that it would provide push-in special education and related services to Student. (N.T. 65) Since then, on days on which OT and PT services are scheduled, Student's parents have brought Student to school, but they have kept him out of the classroom at the times that the push-in related services are scheduled to be delivered. (N.T. 65)
24. On or about November 10, 2006, Student's parents requested a due process hearing.
25. During the mandated pre-hearing resolution meeting, Student's mother attempted to participate by telephone from her lawyer's office. Apparently surprised by this behavior, School District personnel reacted by cancelling the resolution meeting. The resolution meeting was never rescheduled. (N.T. 56-57)
26. On December 28, 2005, I conducted a due process hearing in this matter. Parent Exhibit 1 was admitted over School District objection. Parent Exhibits 4, 7, 8, 14-17, 19, 22, 24-26, and 30 were admitted without objection.³ (N.T. 183) School District Exhibits 1-6 were admitted without objection. (N.T. 184)
27. Student's Parents have no objection to the provision of learning support services to Student in his first grade classroom. (N.T. 126)
28. Student's parents seek a hearing officer determination that Student does not need related services. The two bases for this parental position are:
- a. Related services distract Student from academic instruction.
 - i. Student's Parents believe that Student must devote his full attention to his first grade teacher. They feel that Student is already distracted by the presence of his full time aide nearby. They believe that both pull-out and push-in related services prevent Student from receiving his first grade teacher's instruction. (N.T. 49, 81)

³ Parents did not introduce exhibits numbered 2, 3, 5, 6, 9-13, 18, 20, 21, 23, or 27-29.

- b. Parents are dissatisfied with the quality of related services that the School District provides to Student.
 - i. The School District contracts with the IU for related services.
 - ii. Student's parents believe that IU personnel have low expectations for Student and will not challenge Student. (N.T. 49, 51, 81)
 - 1. They have argued with IU therapists for more challenging goals in the past. They note that a IU vision itinerant disagreed with them regarding Student's need to have his reading materials enlarged. (N.T. 53) Student's parents believe that the focus of IU personnel is on safety, not maximum independence. (N.T. 54)
 - iii. Student's parents believe that IU personnel will not coordinate with Student's privately-secured services.
 - 1. They note that last year, 2004-2005, the IU OT refused to teach Student to supinate his wrist during handwashing, although this was a skill that Student's parents were trying to teach Student at home. The IU OT stated that she would teach functional handwashing rather than reinforce skills taught at home. (N.T. 50)
 - iv. Student's parents will be satisfied if I order that IU therapists may not provide related services to Student. (N.T. 91)
29. Student's parents presented the testimony of their private PT, Ms. T.
- a. Ms. T has been a licensed physical therapist since 1988. (N.T. 37) She has professional experience as a PT in Pennsylvania for the last 12 years, both in private practice and for 3 years (1997-2000) as an employee of the IU. (N.T. 16) Before that, she was a PT with [an organization in another state], in private practice in [a different state], and she was head of a PT department for twelve years at [a] hospital in [a third state]. (NT. 11-12) She currently has a private practice and works for a local organization that provides PT services to children from birth to three years old. (N.T. 16)
 - i. One of the reasons that Ms. T no longer works for IU is because she believes that IU provides services to Students on the basis of therapist availability rather than on the basis of student need. (N.T. 19)
 - b. Since October 2005, Ms. T has provided PT services to Student in his home twice per week for 1.5 hours each time. (N.T. 12, 16)
 - i. Student's PT goals at home are to increase range of motion and strength in his legs, to become independent and safe on a forward walker, and to become independent on steps. (N.T. 27)
 - c. On the morning of November 7, 2005, Ms. T observed Student in his first grade classroom for four hours. (N.T. 12, 27) No PT services were provided to Student during that observation. (27) Ms. T did not observe Student having difficulty following along in class. (N.T. 29) Ms. T did observe, however, wasteful time consumption and reduced exposure of Student to instruction time when Student's teacher failed to give sufficient

warning of an upcoming transition from floor time to the desks, and when an aide expected Student to use the bathroom more independently than was necessary. (N.T. 33)

- d. Ms. T believes it is detrimental for Student to receive PT services at school because it will cause him to miss instructional time. (N.T. 12, 13)
 - i. She notes that Student is highly distractible and she believes that PT services at school would continually distract Student from focusing on his academic and cognitive skills. (N.T. 19, 21)
 - ii. Because Student has the endurance and strength to sit in his chair all day and receive instruction, he does not require PT at school. (N.T. 20, 23) She believes that quick transfers to and from his wheelchair are all that Student needs in school, and that he can work at home on independent transfers to and from his wheelchair. (N.T. 22)
 - iii. If Student was not receiving three hours of PT at home, however, Ms. T would recommend that Student receive school-based PT. (N.T. 14, 19)
 - iv. Ms. T believes that Student's greatest need is a chair that fits him well, because he cannot open book pages or write with a pencil if he is not fully balanced in his chair. (N.T. 30) She believes he also needs a walker to get around, and an aide to help him reach things. (N.T. 31)
- e. Ms. T has not seen Student's IEP and she does not know what related services are offered to Student by the School District. (N.T. 28, 32)

30. The School District's school psychologist testified that the related services offered to the Student by the School District create minimal interference in instruction and they provide a benefit to Student. (N.T. 145) This school psychologist has 18 years experience in his field, including experience over his career with 20 students in the early primary grades with cerebral palsy and ADD symptoms similar to Student. (N.T. 119, 144-145) He testified that even physical interruptions, such as relating to personal care needs in the restroom or movement from chair to floor, have a minimal negative impact upon the instruction of a child such as Student. (N.T. 146) He agrees that Student will miss direct instruction when he is pulled out of the classroom, but he does not believe Student will fall behind academically as a result. (N.T. 155)

31. The IU's special education director testified regarding the quality of Student's related services.
- a. He testified that IU's PT, OT and vision therapists are certified in their specialties by the Commonwealth of Pennsylvania, they have received satisfactory performance evaluations, and there have been no complaints regarding their competence other than the complaints of Student's parents. (SD 5; N.T. 173-175)
 - b. He distinguished between the "medical model" of PT services, such as those typically provided at home, and that are designed to remediate a

patient's overall condition or disability, and the "educational model" of PT related services that are restricted to helping a student benefit from his educational program. (N.T. 177)

32. Currently, the School District is attempting to implement the September 28, 2004 IEP.
- a. To implement the required 60 minutes of learning support services every two weeks, a learning support teacher comes into the classroom for 15 minutes twice per week to reinforce what Student's regular education teacher is providing. (N.T. 126, 143)
 - b. The School District and IU provide a PT on Fridays from 7:45-8:45 a.m. for the required 60 minutes of PT per week, and on Tuesdays from 10:00 - 10:30 a.m. for the additional 30 minutes per week PT consultation. Student's parents arrive promptly with Student for the start of each day, but they hold Student outside of his classroom during the scheduled PT sessions. (N.T. 77, 130)
 - c. Similarly, an OT arrives on Thursdays from 7:30-8:15 a.m., and Student sits outside of his classroom with a parent during that time. (N.T. 77, 128)
33. The School District has recommended to Student's parents that he receive more learning support services, but the School District has not tendered either a proposed IEP or NOREP to that effect, apparently because "that has not been an issue that's been resolved at this point." (N.T. 129-130)
34. Although the School District has offered, in the past, to contract with parents' own therapists for school-based related services, that is no longer an option that the School District will consider. (N.T. 148)

DISCUSSION

I will address the specific issue raised by Student's parents in this case. Then I will address what I perceive to be the underlying conflict between these parties.

I

Student's parents want me to determine that the School District shall not provide related services. Instead, they want the School District to provide only learning support services while Student's parents provide privately-secured related services themselves. In the alternative, Student's parents suggest that I should order that any school-based related services may not be provided by IU personnel.

A school district is required to offer an IEP reasonably calculated to enable a child with a disability to receive meaningful educational benefit. Failure to offer such an IEP will be deemed a denial of a free and appropriate public education (FAPE). Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982)

Further, “FAPE” includes both specially designed instruction and related services. 34 CFR §§300.13, 300.26 The term ‘related services’ means such supportive services, including speech-language pathology, physical and occupational therapy, as may be required to assist a child with a disability to benefit from special education. 20 U.S.C. §1401(26)(A) (2005); 34 CFR §300.24 The over-arching applicable limitation of all related services is that of educational necessity – more specifically, that they be required to assist the Student to benefit from special education. In re the Educational Assignment of J.M., Special Education Opinion No. 1612 (2005) The School District’s legal obligation represents a standard of reasonableness, not optimality, and the focus is on education. In re the Educational Assignment of M.L., Special Education Opinion No. 1498 (2004)

It is not disputed in this case that Student requires both specially designed instruction and school-based related services. He does not process information as quickly as other children, he is delayed in comparison to other children, and Student’s Parents have no objection to the provision of learning support services to Student in his first grade classroom. (N.T. 26, 116, 126, 129-130; SD 2; SD 6) In addition, Student’s private PT would recommend school-based PT services if Student was not receiving three hours of PT at home. (N.T. 14, 19) Further, Student’s parents are very satisfied with the speech therapy that Student is receiving this year, primarily because the speech therapist this year has been very open to parental suggestions, valuing their input and agreeing with many of their opinions. (N.T. 53)

Thus, because Student needs both specially designed instruction and related services, the School District’s IEP must include both. Accordingly, I cannot order that the School District is not obliged to provide related services to Student simply because his parents prefer to provide those particular services at home.

It is irrelevant that the IDEIA allows parents to refuse the initial provision of special education and related services, and holds School Districts harmless for the denial of FAPE in such cases. (P 1) 20 USC §1414(a)(1)(D)(ii) Student’s parents are not refusing the School District permission to provide special education to Student, but rather they seek to permit some, and refuse other, services.

It also is irrelevant that, when the IU was responsible for Student’s entitlement to early intervention services, the IU acceded to the requests of Student’s parents to stop providing related services. (N.T. 55-56, 107-108) Similarly, it is irrelevant that the School District has stopped providing transportation services in response to parental request, and it is irrelevant whether one or the other public entity consistently requested such parental requests in writing. The only thing that is relevant is whether or not Student needs related services in addition to specially designed instruction. In this case, such need is undisputed.⁴

⁴ Assertions of Student’s parents and their witness Ms. T. that related services prevent Student from receiving appropriate academic instruction do not relate to Student’s need for related services, but rather they relate to how Student’s various services should be coordinated and what would be appropriate IEP goals.

In addition, the personnel who implement the IEP simply must meet State qualifications designed to ensure that they are appropriately and adequately prepared and trained, including having the content knowledge and skills to serve children with disabilities. 20 USC §1412(a)(14) It happens in this case that the School District contracts with the IU for related services. The IU's special education director testified that its PT, OT and vision therapists are certified in their specialties by the Commonwealth of Pennsylvania, they have received satisfactory performance evaluations, and there have been no complaints regarding their competence other than the complaints of Student's parents. (SD 5; N.T. 173-175) I have no basis for concluding, therefore, that IU personnel should not implement Student's IEP.

Thus, because Student needs both specially designed instruction and related services, the School District must provide both. And because IU personnel satisfy state qualification requirements, the School District may use such personnel to provide Student's OT, PT and vision therapies. Accordingly, I find for the School District in this case.

II

As dictum, I note that the underlying conflict between these parties is probably not the IU's personnel.⁵ I suspect that the parties will develop a more precise, and more realistic, understanding of their actual, underlying conflicts when they adhere more closely to IDEIA procedures.

Student's parents have always been extremely involved in their child's education, and they have been very focused upon controlling, as much as possible, the manner in which Student is educated. This is demonstrated in the arrangement that Student's parents had last year with Student's private school, which made any accommodations requested by Student's parents, while Student's parents privately secured any PT, OT and other related services that they believed Student needed. (N.T. 94, 103, 110) It also describes the arrangement that Student's parents and the IU developed during Student's early intervention years, when the IU, more than once, ceased PT and/or OT services at parental request (apparently with no questions asked) whenever Student's parents were dissatisfied with those services. (N.T. 55-56, 107-108) Even this 2005-2006 school year, the School District and Student's parents started to develop something of a "shared-control" arrangement, at least with respect to the parental request to stop public transportation (N.T. 69-70; P 14), as well as with the School District's initial agreement to provide "observation and consultation-only" related services, which were intended to be "very low key, no hands-on." (N.T. 63; P 22)

Conceptually, such give-and-take between the parties is appropriate. While the primary purpose of the IDEIA is to provide FAPE to each eligible child, a second purpose, which is designed to contribute to the first, is the cooperative relationship, or partnership, between the

⁵ Professional personnel often change employment and Student's own private PT, Ms. T is a good example of this, having once worked for the IU. Who knows who might be working for the IU, or the School District, in the future. This is why it is more appropriate to review the credentials of the actual personnel who are implementing an IEP, rather than to issue blanket prohibitions against employees of particular employers.

school district and the child's parents. In re the Educational Assignment of K.M., Special Education Opinion No. 1313 (2002) In fact, this is the idea behind so much parental participation in the evaluation and IEP development processes.

I suspect that what has happened in this case, however, is that as the informal give-and-take process developed between the parties, they gradually lost the objectivity that they might have achieved through closer adherence to the procedures outlined in the IDEIA and applicable state and federal regulations.

Thus, for example the School District appears to have been stymied when, in summer 2005 it was refused parental permission to update Student's present education levels (N.T. 124), despite the existence of override procedures in federal and state regulations for such circumstances. 34 C.F.R. § 300.505(b); 22 PA. CODE § 14.162(c); In re the Educational Assignment of R.P., Special Education Opinion No. 1253 (2002)

In addition, somehow the issue in this case was framed when Student's parents in artfully responded to the School District's general inquiry, around September 21, 2005, into the parents' "won't budge" issues. (N.T. 96, 104) Probably a more precise method of framing the issue in this matter would have been for the School District to articulate its vision of FAPE in a proposed 2005-2006 IEP, with accompanying NOREP, and then to allow Student's parents to articulate their counter-vision through the due process hearing request process. (See Finding of Fact 33)

When the parties do eventually focus upon their precise articulations of what Student's 2005-2006 IEP should look like, they should keep in mind that the purpose of the IEP is not to provide the "absolute best education" or "potential maximizing education" for the child. The IEP must simply propose an appropriate education for the child. Fuhrman v. East Hanover Bd. Of Educ., 993 F.2d 1031 (3rd Cir. 1993) An IEP is appropriate if, at the time it was offered, it was reasonably calculated to provide some meaningful educational benefit to the Student. The benefit must be more than de minimus. Susan N. v. Wilson School District, 70 F.3d 751 (3d Cir. 1995); Carlisle Area School District v. Scott P., 62 F.3d 520 (3d Cir. 1995)

CONCLUSION

Student's parents, while acknowledging that Student needs both special education and related services, want to provide privately-secured related services themselves, and they want me to determine that the School District will not provide related services. It is undisputed, however, that Student requires both specially designed instruction and school-based related services and, therefore, the School District's IEP must include both. Accordingly, I will not order that the School District not to provide related services to Student simply because his parents prefer to provide those particular services at home.

ORDER

For the reasons described above, I DENY the request of Student's parents that the School District be ordered not to provide related services.

Daniel J. Myers

Hearing Officer

January 16, 2006

Re: Due Process Hearing
File Number 6045/05-06 AS
Student