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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

Hearing Officer Decision

A. H.

Birthdate: xx/xx/xx

Hearing Dates: February 3, 2006
February 10, 2006

Final Briefs Received: February 28, 2006
File No: 6072/05-06 KE

Closed Hearing

Parties to the Hearing:

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Hearing Officer : Joseph G. Rosenfeld, Ph.D.

I. Background

Student¹ is a xx year old fourth grade student who resides within the boundaries of the Methacton School District (SD). She is eligible for special education under the category of mental retardation. The student has had early intervention, preschool services and IEPs from the SD. She has received instruction in the academic areas of reading, math, and written language. She has also received speech and language services, as well as occupational and physical therapy. She entered the SD in the Elementary School in a learning support class from kindergarten through 2nd grade. At that time the student was provided with a one to one therapeutic support staff person (TSS) by a local community mental health center. In 3rd grade she transferred to the Elementary School in a learning support class. The first two months of 3rd grade went well. Consequently, the mental health center ceased providing TSS services. However, her behavior worsened and she had to be physically restrained in November 2004. The IEP team met to review a private neuropsychological examination (SD-8) that recommended that she not be educated in a mainstream environment. In March of the 04-05 school year a behavior intervention plan was produced. By May, the SD obtained the input of a psychiatrist who recommended to the family that the student either receive homebound instruction or be placed in a partial hospitalization program. The family obtained a partial hospitalization program for May and early June of 2005. Since the school year was almost over when she was discharged, she finished the school year with homebound instruction. For the 05-06 school year, with parental agreement, she was placed in a life skills program provided by [a] County Intermediate Unit (IU) in [another] School District at the Elementary School, which is her current placement.

The parents do not believe that the student received FAPE² because of a lack of a functional behavior assessment (FBA) and a behavior intervention plan that was derived from an FBA during the 04-05 school year. They also assert that 05-06 IEP is not appropriate because it is not in the least restrictive environment since it is in an IU program in a school that requires a bus ride of approximately one hour or longer each way, depending on traffic patterns. The SD asserts that the length of the commute does not impact her ability to access her education and therefore it cannot be deemed to deny her a FAPE on that basis (NT p. 23). The parents are requesting full days compensatory education for the 04-05 and 05-06 school years (NT p. 17)³. The SD claims that the student received FAPE in the 04-05 school year and made meaningful progress in the learning support environment. The SD acknowledges that the student had significant behavioral problems in the 04-05 school year. However, the SD claims that it made strong efforts to address her problems in order to assure that FAPE was delivered by behavioral interventions applied throughout the year. Specialists observed, assisted and trained teachers in behavioral intervention techniques. Further, the SD asserted that the life skills placement in the IU program provided the student with the type of curriculum and intensive support that she required in order to be successful (NT pp. 20-22) and is therefore an appropriate program.

II. Findings of Fact

¹ Will be referred to as the student or Student for the balance of the report to assure greater confidentiality and to simplify later redaction of identifying information. Methacton School District will be referred to as SD.

² FAPE = Free Appropriate Public Education

³ NT-# = note the transcript page number. S-# indicates a school district exhibit, P-# indicates a parent exhibit, FF-# indicates findings of fact.

1. The student's date of birth is xx/xx/xx. The biological parents live in separate households and both reside within the boundaries of the School District (NT p. 26).
2. The student is eligible for special education under the category of mental retardation. She has also demonstrated emotional, behavioral and speech and language needs (Stipulation, NT p. 27). The neuropsychological examination of Dr. S indicated a full scale IQ of 47 on the WISC IV but with other WISC IV scales between the 53-65 ranges (S-7, p. 5).
3. At six months of age, she was diagnosed as having hydrocephalus. She had a shunt placed in her brain to drain of the excess fluid. She also had over 70 seizures since her third birthday (S-7, p.2).
4. In the 2002-2003 school year she received TSS support for 10 hours per week in school, a behavior specialist consultant for 3 hours per week, and a mobile therapist for 2 hours per week at home. Her TSS support dropped to two hours per week during her extended school year (ESY service). The supports were in place due to her difficulty with frustration tolerance, underdeveloped social skills and poor communication skills. She was impulsive and reacted to frustration with aggressive behaviors such as pushing, scratching, hitting, [and other behaviors]. She demonstrated this behavior nearly every school day (S-7, p. 2).
5. The IEP of November 2003, that included the beginning of the 2004-2005 school year, did not have a formal behavior intervention plan but it contained behavioral goals and objectives (NT p. 123, S-3, pp. 15, 21).
6. Towards the end of the 03-04 school year she was started on Zoloft medication and her behavior at home and school improved dramatically. TSS services were then removed by the mental health agency. (NT pp. 42-43). The good effect of that medication lasted for about six months and several other medications were then tried (S-30 p.4).
7. Dr. S, a neuropsychologist who examined Student, indicated that Student needed an educational environment that allowed significant curriculum modification and individual attention. He opined that it did not appear that she could be adequately educated in a mainstream environment (S-7, p. 10).
8. Student started out well in the beginning of the 04-05 school year (3rd grade). The teacher implemented the specially designed instruction from the November 2003 IEP. There was a quiet area, modeling target behavior, using a timer, verbal warnings, positive reinforcement and various other strategies, including using the services of the occupational therapist (NT pp. 404-408).
9. By the end of November 2004 Student was having severe behavior episodes that disrupted the class and sometimes necessitated her removal from the room (NT p. 57). Her behavior became more physically aggressive (NT p.58, S-30 p.2).

10. The third grade class had a behavior specialist who came in once per week to run a social skills group for the class but that was not mentioned in the December 8, 2004 IEP. Thus no goals or objectives were specified for it (NT pp. 136, 138, 377, S-8).
11. Ms. K. is a behavior specialist who is employed by the IU and has been assigned to the SD for the past six years.(NT p. 243). She began the functional assessment of behavior process in November of 2004, observing weekly. On December 7, 2004, she did a more intensive review and issued a report (NT pp. 243-244, 246-248, S-57). The teacher's anecdotal notes were also a vital part of the functional assessment of behavior (NT p. 250, S-18, S-29).
12. The IEP of December 8, 2004 indicated that there was a behavior management system in place in the special education classroom where Student could earn two breaks a day and a prize from the treasure chest on Fridays (S-8, p. 8). Positive reinforcement and immediate feedback were part of the specially designed instruction (S-8, p. 18). This was a classroom system that the teacher would "tweak" depending on the individual needs of the child. The system was designed with the consultation of the behavior specialist who had observed the class and Student. (NT 262). The IEP did not have an individual behavior interaction plan for Student because that was already part of the specially designed instruction of the learning support class (NT pp. 156, 264).
13. The March 2, 2005 revision of the IEP has a behavior intervention plan that includes baseline data, short-term behavioral objectives, an evaluation schedule and specially designed instruction with rewards and consequences for displayed behavior (S-11, pp. 27-30).
14. While a formal behavior intervention plan was implemented on March 15, 2005, many of the strategies were in effect earlier in the 2004-2005 school year. However, there was no functional assessment of behavior report written prior to June 14, 2005 (NT p. 286, S-11 pp.27-30, S-29, p.5).
15. On May 13, 2005, Dr. C performed a psychiatric evaluation. At that time, she indicated that in Student's situation there was a danger to Student or others. She pointed out that Student's behavior was very well established, repetitive and very frequent for the 5 months prior to the exam. She did concur with a short-term one-to-one placement but had doubted that it would significantly alter her behavior. She recommended an alternative setting to break her aggressive patterns (S-30, p. 6).
16. On March 30, 2005 a meeting took place with representatives from [a] Mental Health Center. [The Center] decided not to send a TSS to the school because they would have recommended what the school was already doing through the contracted behavior specialist from the IU (NT p. 167).
17. The father was able to locate a partial hospitalization program at [a health facility] that admitted her for a few weeks. For the final week of the school year, she received homebound instruction (NT pp. 74-75).
18. The parents did not believe it was in Student's best interest to return to her [previous] class the following semester (NT p. 77). While they would have preferred a placement in the School District or a neighboring school district, they consented to an IU placement.

19. For the 2005-2006 school year Student entered the 4th grade in a life skills support class in a County IU program in [another] School District at the Elementary School, which has mostly regular education students and some IU classes (NT p. 84).
20. In the IU program, Student is mainstreamed for art, music, and gym. Reading and Math instruction, work on individual goals, a vocational component and some community based instruction take place in the life skills program, as do the necessary specials. (NT p. 200).
21. In an IEP meeting conducted in November 2005, a life skills class in [a second] School District was offered but the parents refused it because they did not wish to move the student again for the sake of a closer bus ride (NT pp. 84-85, 351-353, S-45).
22. By stipulation, the content of the 2005-2006 school year IEP is not at issue. Parents' issue is the least restrictive environment for the placement. (NT pp. 25-26) and the bus ride of over an hour each way (NT pp. 88-89).
23. In the IU program Student is showing progress in her IEP goals and objectives. Socially she seems happy. She gets along well with other students and has established rapport with the teachers and assistants. There have not been any behavioral outbursts (NT pp. 202-203, 207-209, 211-212).
24. A functional behavior assessment has not been needed in the IU program because she has not displayed any problematic or aggressive behaviors. There is a behavioral plan for Student. But basically the class operates on a reinforcement token system (NT pp. 212-213).
25. In the IU program, school begins at 8:30 am but Student's bus does not arrive until 9 am or sometimes a little after. The school day is from 8:30am to 3:00 pm (NT pp. 89, 101-102, S-45 p. 34).
26. When Student arrives at the Elementary School, she seems happy, greets the teacher, completes the required routine, sits down and is ready to work (NT p. 215).
27. There are six students in the IU class. Two of the students are from the SD. In the Life Skill Support class things are done at a different pace with more repetition and visual strategies, play skills and social skills are taught along with daily living skills (NT pp. 221-228).
28. Student arrives home at about 4:15 or a few minutes later. She is sometimes fidgety on the bus but has never been officially written up or disciplined during the current school year. After school, she participates in church chorus activities once per week, and takes swimming lessons on Saturdays. She receives TSS services at home on Tuesday and Thursday at 4:30 pm (NT p. 113).
29. Student is experiencing more success in her 05-06 program than she did the previous year (NT pp. 336-337).
30. In the life skills support classroom, a major part of the program includes the repetitive nature of instruction throughout the day with an emphasis on life skills, personal safety, etc, in addition to

redirected behavior. Student feels success and less frustration in this program. The learning styles and the higher expectations for academic performance and the level of instruction in the learning support program are more frustrating for the Student. The SD asserts that the current life skills program where Student is achieving success and behaving better is not portable to any other program within the SD especially in light of Student's low level of frustration tolerance (NT pp. 337-338, 340-341, S-30, p. 6).

31. In the social area, she has developed a number of friendships within her class and at recess. She interacts with peers. She loves to sing and perform and there are times when it is appropriate in the life skills environment. There is more opportunity to generalize appropriate behavior in the life skills program than in a learning support program. She is not stressed and the work is challenging (NT pp. 446-450).
32. In the continuum of placements considered for the student, the life skills support class was deemed by the SD to be the least restrictive environment in her current academic and emotional and behavioral state (NT 369-371).
33. Extension of time for the decision was granted by the parties (NT p. 468).

III. Issues:

1. Was the IEP devised for Student inappropriate due to a lack of a timely functional behavioral assessment and consequently a lack of an appropriate behavioral intervention plan for the 2004-2005 school year?
2. Was there a denial of FAPE on the basis of Student's program not being in the least restrictive environment due a lengthy bus ride and late arrival to a school not in the local SD?
3. Is an award of compensatory education justified for both the 2004-2005 school year and the 2005-2006 school year?

IV. Discussion and Conclusions of Law:

In a recent decision in *Schaffer v. Weast*, ___ U.S., 126 S. Ct., 528 (2005) the Supreme Court held that the party seeking relief has the burden of proof in administrative proceedings in cases under the Individuals with Disabilities Education Act (IDEA). In this case, this decision effectively put the burden on the parents to prove that the SD's proffered individual education program was inappropriate and that the SD did not comply with the mainstreaming requirement of IDEA. 20 U.S.C. § 1412(5)A. This is a reversal of previous procedures which required the school district to have the burden of proof that its programs were appropriate and that the mainstreaming requirements were met.⁴

⁴ *Obert v. Bd. Of Educ of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3d Cir. 1993), which placed the burden of proving the mainstreaming requirement upon the school district regardless of who brought the action. That requirement is effectively overturned by *Schaffer v. Weast*. See *Angela Greenwood, A Minor, By Her Parent, Susan Greenwood v. Wissahickon School District, et al* Civil Action No. 04-3880 in the U.S. District Ct ED Penna. (February 3, 2006).

The first issue deals with the 2004-2005 school year. There is no doubt that this was a difficult year for all parties. When the semester started, the IEP of November 2003 was still in effect. It did not have a formal behavior intervention plan although it contained behavioral goals and objectives (FF-5). In the previous school year there had been behavior problems but Student received medication and her behavior had improved (FF-6). During September and October of 2004 her behavior was not problematic. By the end of November 2004 there were some severe behavior episodes that disrupted the class and necessitated her removal from the room (FF-9). The parents' contention here is that an FBA should have occurred within a reasonable time after this behavior started.

From the testimony and exhibits presented at the hearing, we learn that the third grade class that Student attended had a behavior specialist, Ms. K, who came in once per week to run a social skills group (FF-10). She testified that the FBA is a process and not a specific observation leading to a report. She claimed that the process was started in November 2004, with a more intensive review leading to a report on December 7, 2004. She emphasized that the teacher's anecdotal notes were a vital part of the FBA (FF-11). Further, there was a behavior management system in effect for the entire class that was "tweaked" to the individual needs of the child. She asserted that an individual behavior interaction plan for the IEP was not necessary because that was part of the specially designed instruction in the December 8, 2004 IEP (FF-12). The March 2, 2005 revision of the IEP had a behavior intervention plan that included baseline data, short-term behavioral objectives, an evaluation schedule and specially designed instruction with rewards and consequences for displayed behavior (FF-13). The formal behavior intervention plan was implemented on March 15, 2005, although the FBA was not written until June 14, 2005 (FF-14).

I have no doubt that the SD worked to try to find a solution to the problems presented and that the behavior specialist was involved with the special education teacher. The SD revised its IEP as the behavior worsened. The psychiatrist's report of May 13, 2005 indicated that in Student's present situation she was a danger to herself or others. Dr. C indicated that the Student's negative behaviors were very well established and she recommended an alternative setting to break her aggressive patterns (FF-15). I have used the date of this report indicating that the program was no longer viable, and thus the IEP was no longer appropriate, as the point where I would calculate compensatory education⁵. It was evident by that date that the FBA process started in November of 2004 should have yielded a written report by that date at least by the date of the psychiatric evaluation. I find that writing the report in June 2005 was not timely. It would have been useful to have a written FBA before the psychiatric evaluation. Thus I have used the date of the psychiatric evaluation as the date when the SD should have known that the extant program was no longer appropriate. The exact number of days for compensatory education for the 2004-2005 school year shall be determined by counting the school days from May 13, 2005 to the end of the school semester in June 2005.

2005-2006 School Year

The second issue deals with what the parents consider a lengthy bus ride and the least restrictive environment and whether those issues led to a denial of FAPE. Beginning with the placement issue,

⁵ The time stamp when this report was received by the SD is blurred, Mr. S identified it as June 14, 2005 (NT p. 343). I find that the school district specialists and behavioral consultants should have been able to independently recognize the failing program by the date of that report. The psychiatrist's report is the primary document that implies that the IEP was no longer viable.

everyone giving testimony, including the parents, agreed that it would be better not to maintain Student in the [previous] Elementary School (FF-18). Changing the school was also consistent with the psychiatrist's recommendation (S-30, p. 6, FF-18). The SD determined that it did not have a program to meet Student's needs and thus contracted with the IU for a placement. The IU program is located in a regular education elementary school within the county, but it is in a district not immediately contiguous to the SD. Student has been making progress in the program and has not had any serious behavioral incidents. The contents of the program are not at issue at this hearing. There is a question of the length of the bus ride. I do not quarrel with the notion that for most students a short bus ride is preferable over a long bus ride. However, preferable is not the critical issue. The issue is, does the length of the bus ride lead to the student being unable to learn or to benefit from her IEP. It is not the specific number of minutes the bus ride takes. The evidence shows that in the IU program Student shows progress in her IEP goals and objectives. Socially she seems happy, gets along well with other students and has established rapport with her teachers and assistants. There have been no behavioral outbursts (FF-23, 31). When student arrives at school, she seems happy, greets the teacher, completes the established routine, sits down and is ready to work (FF-26). Thus I find that the amount of time the bus ride takes does not negatively impact on the student's program to render it inappropriate. I do note that the bus arrives at school approximately 30 minutes late every day. It is reasonable to expect the bus to get the students to school on time. Thus I find that Student is entitled to 30 minutes of compensatory time for every day the bus is late. If it were for the full academic year of 180 days, then the student would be entitled to 90 hours of compensatory education.

Discussing the least restrictive environment, 34 CFR § 300.550(b)(1) indicates that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled; and (2) that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the aid of supplementary aids and services cannot be achieved satisfactorily. In 34 CFR § 300.552(c) unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if not disabled and (d) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

The facts indicate that in the 2004-2005 placement in the [previous] school in the local SD, Student was having severe behavior episodes that disrupted the class. Many of her behaviors were impulsive and unpredictable. [Redacted.] The psychiatrist thought that she was a danger to herself or others and she needed to be removed from that neighborhood school setting. Removal from the learning support class environment to the social skills class environment yielded a significant change in behavior in a positive direction. Testimony from the SD staff indicated that there was no fourth grade equivalent program in the SD because this was a low incidence disability (NT p.339). Thus the move was justified. The SD considered several possible placements, and of those available found that the program that would meet her needs in a public school setting with regular education students was the IU program. The IU class has six students. Two students are from the SD (FF-9). Further, the evidence presented indicated that it would be difficult to transport this particular social skills program to another type program within the SD in light of Student's low level of frustration tolerance (FF-30). No evidence was presented contradicting these contentions. While mainstreaming and inclusion are indicated in the law, all programs are individualized to the needs of the specific student. In this case, the student is making progress without the negative behaviors that were present in the previous year. Thus I find the current program to be appropriate, and in the least restrictive environment at this time, but award 30 minutes of compensatory education for each day Student

is brought late to school by the school bus. Since student is making progress in her current program, I agree with the parents' previous determination not to change the program at this time for the sake of a shorter bus ride. Since student is progressing and no longer showing significant behavior problems, for the 2006-2007 school year the IEP team should consider an appropriate program, preferably within the home SD, or a contiguous school district.

V.. Accordingly the following is made:

ORDER

1. Compensatory Education is awarded to the parents from May 13, 2005 for every school day until the last day of classes in June 2005. If converted to hours, the number of hours per day shall equal what would be a normal school day.
2. Compensatory Education is awarded to the parents for the 2005-2006 school year for 30 minutes per school day until the current date and 30 minutes per day for each additional day, Student arrives late for a maximum of 90 hours per 180-day school year.
3. Parents shall decide how the compensatory education hours will be used to further Student's IEP goals.

Joseph G. Rosenfeld, Ph.D.
Hearing Officer