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Due Process Hearing for T.P.

Date of Birth: xx/xx/xx

ODR File Number: 6636/05-06/AS

Date of Hearing: July 24, 2006

DUE PROCESS HEARING

Parties:

Manheim Twp. SD
2933 Lititz Pike
Lititz, PA 17606-5134

Representative:

Jeffrey Champagne, Esq.
McNees Wallace & Nurick
100 Pine St., PO Box 1166
Hbg, PA 17108-1166

Ms.

Pro se

Date Transcript/Exhibits Received:

July 28, 2006

Date of Closing Statements/Record
Closure:

July 28, 2006

Date of Decision:

August 11, 2006

Hearing Officer:

Joy Waters Fleming, Esq.

Background

Student is currently xx years of age and enrolled in the Manheim Township School District, "District". Student is eligible for and receives special education as a student with a traumatic brain injury and speech or language impairment.

Issues

Did the District deny Student FAPE by not providing a one to one assistant to him during the school day and on the school bus?

Findings of Fact

1. Student is currently xx years of age and a student in an IU operated classroom at [redacted] Elementary in the Manheim Township School District, "District". (N.T. 145)
2. Student is a resident of the District. (N.T. 146)
3. Student has been enrolled in the District since August 2003. (N.T. 146)
4. Student is eligible for and receives special education as a child with a traumatic brain injury and speech and language impairment. (N.T. 147)
5. Student's brain injury occurred after he suffered injuries [redacted] in 2001. (SD-1)
6. Student's brain injury has resulted in him having unsteady gait, mild seizures and other neurological and behavioral issues. (N.T. 46, 67)

7. During the school day, Student walks with a walker and primarily uses his wheelchair for transports from bus to school. (SD-1)
8. Student needs close supervision 100% of the time when walking. (SD-1, N.T. 23, 63)
9. Since 2002, Student has been a patient at [redacted] Pediatric Center receiving physical therapy for balance issues. (N.T. 22, 26, 34, 41)
10. For the last four years, Student has received the services of a nursing assistant, in his home, for 42 hours a week. (N.T. 62, 74)
11. On December 22, 2003, the District completed its re-evaluation of Student. (SD-1)
12. In January 2004, the District offered Parent a NOREP. (SD-2.1)
13. Parent rejected the January 2004 NOREP on grounds that the District would not provide Student with paraprofessional support during the school day. (SD-2.2, N.T. 148)
14. On May 19, 2004, a special education hearing officer dismissed Parent's request for a hearing because she failed to appear. (SD-3, N.T. 152)
15. In January 2005, the District offered Student an IEP. (SD- 4, N.T. 152)
16. Parent approved the NOREP accompanying the January 2005 IEP although a one to one aide was not offered by the District. (SD-4.15, 4.16, N.T. 153)
17. During the 2005-2006 school year, Student started out in an IU operated primary physical support class and then moved to an intermediate support class. (N.T. 109, 113)

18. Student's classroom for the 2005-2006 school year contained eight other students, a full-time teacher, a full-time para-educator and a part-time para-educator. (N.T. 109-110, 124)
19. In addition to the class-wide para-educators, Student's classroom also contained two other part-time para-educators as well as a full-time nurse assigned to specific students. (N.T. 111)
20. The class-wide para-educators were responsible for assisting the teacher by working individually with the students, taking the children to the bathroom and assisting with transitioning activities outside of the classroom and lunch duties. (N.T. 127)
21. In addition to Student, three other students were ambulatory, when assisted, the rest in wheelchairs. (N.T. 111)
22. A full-time nurse is assigned to cover the six IU operated classrooms at Elementary serving the 48-50 students. (N.T. 113)
23. Early in the 2005-2006 school year, Parent contacted the District and requested that aide accompany Student on the school bus. (N.T. 153)
24. In October 2005, Parent was invited to an IEP meeting to discuss her concerns regarding Student's safety and the need for a one to one aide. (SD-6, N.T. 156)
25. On November 2, 2005 and again on December 16, 2005, the IEP team met and amended the IEP to provide for the administration of medication to Student during the school day. (SD-7, N.T. 156)
26. On March 9, 2006 an IEP meeting occurred with the District, Parent and Student's home health services nurse for the purpose of discussing the necessity of a one to one aide to ensure Student's safety. (N.T. 161)

27. At the IEP meeting, the team suggested that Student's home health services nurse visit his classroom in order to observe, first hand, the classroom environment and daily activities. (N.T. 55, 116)
28. After the IEP meeting, in March 2006, Student's nurse observed his classroom for three hours. (N.T. 51-53, 162)
29. The health services nurse observed Student during a typical school day, wearing a helmet, having a tantrum and accompanied him to music class. (N.T. 51-53)
30. After the observation, Student's nurse concluded that although Student did not have a one on one aide that he was "safe" in his classroom. (N.T. 50-51)
31. On March 10, 2006 the District offered Parent a NOREP in which it refused to provide a 1:1 aide to Student. (SD-9.4)
32. Parent did not sign the March 10, 2006 NOREP. (SD-9.4)
33. When Student leaves his classroom for music and library, he is accompanied by a para-educator. (N.T. 112)
34. During the 2005-2006 school year, Student's medication was repeatedly adjusted which resulted in changes to his behavior, alertness and his ability to communicate with others. (N.T. 63-64, 78)
35. Student has fallen in his classroom (P-3, P-4, and P-5)
36. If at risk of falling because of behavioral or health concerns, Student is kept in his wheelchair by his teacher. (N.T. 118)
37. If Student spends too much time in his wheelchair he experiences redness on his extremities. (N.T. 89)
38. No District issued IEP ever indicated the provision of a one to one aide for Student during the school day or on the school bus. (SD-7, N.T. 150)

39. Student lives approximately two miles from his elementary school and he rides to school, with one other child, in a bus modified for wheelchairs. (N.T. 163)

Discussion and Conclusions of Law

The IDEA requires that states provide a “free appropriate public education” “FAPE” to all students who qualify for special education services. 20 U.S.C. §1412. In Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Rowley standard is only met when a child's program provides him or her with more than a trivial or *de minimus* educational benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988). This entitlement is delivered by way of the IEP, a detailed written statement arrived at by the IEP team which summarizes the child’s abilities, outlines goals for the child’s education, and specifies the services the child will receive. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993). School districts are not required to provide the optimal level of services. Carlisle Area School District v. Scott P., supra. However, a program that confers only trivial or minimal benefit is not appropriate. Polk.

Both parties agree that Student is eligible for special education on the basis of his traumatic brain injury. As a result of this condition, Student suffers from other health concerns including seizures and an unsteady gait. (FF. 1,4,5,6) When unsupported or unsupervised, Student has fallen. (FF. 35) Parent contends that her son requires the services of a one to one assistant in the classroom and on the school bus both to and from school.¹ This is necessary, she claims, because Student has fallen on several occasions and she fears for his safety.

A special education aide is classified by the Pennsylvania Department of Education as a “paraprofessional” who provides special education

¹ Consistent with the U.S. Supreme Court’s decision in Shaffer v. Weast, Parent has the burden of proof in this proceeding.

assistance on a one-on-one basis, or general special education support in a classroom.² This individual is not required to hold any certification or to be specially trained. Although Student receives the services of a health aide for 42 hours week in the home; he has never had a one to one aide assisting him during the school day. (FF.10, 38) For the following reasons, based on the totality of evidence presented, the Parent has not established her burden of proof that the District failed to offer Student a free appropriate education by denying a personal aide to assist him in the classroom and on the school bus.

In support of her contention that an aide is necessary for Student's safety, Parent presented the testimony of three witnesses.³ The first witness, Student's former treating physical therapist, offered that Student is frequently unstable when walking and that during his therapy he needs constant supervision. (FF. 9) Although her information regarding Student's needs during therapy session was useful, he is no longer her patient and she could not provide any first-hand information about how Student's disability affected his needs during the school day or on the school bus. (FF. 9) On the contrary, Parent's second witness, a home health service nurse was both relevant and credible. After attending an IEP meeting on Student's behalf, this witness agreed to observe Student's classroom to determine his level of safety. (FF. 26-30) On direct examination, she offered that based on her classroom observations, Student was safe with the current staffing ratios. (FF. 30) Parent's final witness was Student's health care aide. (FF. 34) She offered that Student's balance is inconsistent and that he has fallen while in her care but that her overall concern was for Student's safety because of his seizures. (FF. 34) Student suffered a serious and tragic accident at a young age. (FF. 5-6) Undoubtedly, Student's home aide and his Parent care very deeply for Student and want to take every conceivable measure to ensure his continued well-being. However, absent the introduction of compelling medical evidence that Student's safety is compromised by the current program and transportation plan in place, Parent cannot prevail.⁴ Parent was not able to provide any credible medical substantiation of Student's seizure condition and how his resultant needs have not been met by the current

² See Pennsylvania Department of Education Certification and Staffing Policy No. 107 "Utilization of Paraprofessional Staff".

³ Throughout the hearing, Parent attempted to reach, by telephone, Dr. C, a treating physician of Student; however, she was not available. (N.T. 176)

⁴ As part of her exhibit package, Parent had several letters from physicians and other health care practitioners; however, they were not available to testify either in person or telephonically. The District's objection regarding the introduction of those exhibits was sustained. (P-1, 13, 14, 15, N.T.)

staffing configuration and transportation plan currently in place by the District.

On the contrary, the evidence presented by the District has established that Student's classroom is adequately staffed and his educational and safety needs are being met by the existing staff to student ratio. The evidence has established that Student receives most of his education in an IU operated classroom with eight other students, a full-time teacher, a full-time para-educator and a part-time para-educator. (FF. 17-22) In addition to those individuals, one of the students is accompanied by a full-time nurse and two other students have para-educators providing assistance. (FF. 19, 22) All of the children have varying degrees of physical disability and require assistance and supervision. (FF. 18) In addition to the classroom staffing, Student's elementary IU classrooms are staffed by a full-time nurse devoted to responding to the needs of approximately 48 students. (FF. 22) Although Student has fallen at school, he has also fallen at home. (FF. 34-35) On days when Student appears to be at a higher risk for such an accident, the District has taken the necessary precautions to ensure his safety. (FF. 33, 36) Student lives a short distance from school and no evidence was presented that his safety was compromised by that ride. (FF. 39) Overall, the evidence has established that the assignment of a one to one aide to Student is not necessary to provide FAPE. Although, Parent has communicated her desire for an aide very clearly to the District on repeated occasions, the best way to ensure Student's well-being is for consistent, truthful communication regarding Student's medication, diagnoses and treatment recommendation to occur. (FF. 12-16, 23-25, 31-32, 37)

Based on the totality of the evidence presented, the Parent has not met her burden of establishing that the District failed to provide Student with FAPE by denying him a one to one aide.

ORDER

And now, this 11th day of August 2006, Parent's request for a one to one aide is dismissed.

Jurisdiction is relinquished.

By: Joy W. Fleming
Joy Waters Fleming, Esq.
Special Education Hearing Officer
August 11, 2006