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## DECISION

Due Process Hearing for AF

ODR File No. 7376/06-07 LS

Date of Birth:           xx/xx/xx

Date of Hearing:       April 13, 2007 – Open Hearing

Parties to the Hearing:

(Parents)

East Penn School District  
800 Pine Street  
Emmaus, PA 18049

Hearing Officer:     Debra K. Wallet, Esq.

Record Closed:       April 24, 2007

Date of Decision:     May 9, 2007

Representative:

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## BACKGROUND:

Student is a gifted xx-year-old (date of birth xx/xx/xx) who currently attends regular fourth grade classes in the East Penn School District [hereinafter School District]. Student is the subject of a stipulated Service Agreement pursuant to Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §793 [hereinafter Section 504] providing for accommodations such as preferential seating and repetition and clarification of directions as needed or requested because of identified auditory problems. Student does not have an individualized education program [hereinafter IEP] under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400 *et seq.* [hereinafter IDEIA].

This case raises the interesting legal question of whether Parents may be reimbursed for an independent educational evaluation [hereinafter IEE] where there has been no formal recognition of eligibility for services under IDEIA.

## ISSUES:

1. Whether or not Parents are entitled to reimbursement of the cost of an IEE of Student by Ms. Y, M.S., CCC-A/SP in the amount of \$1,650.00.
2. Whether or not the School District must reimburse the Parents for the transportation costs in obtaining the Ms. Y IEE.
3. Whether Parents are entitled to attorney's fees.

## FINDINGS OF FACT:

1. At the time of the hearing, Student was a xx-year-old, born xx/xx/xx, currently attending the fourth grade in the School District. (N.T. 19; P-1, p. 1).

2. On or about February 16, 2007, Parents asked for a Due Process Hearing on their request that the School District reimburse the Parents for the cost of obtaining an IEE, including transportation, and for attorney's fees as the "prevailing party." (P-14).

3. A Resolution Meeting on March 20, 2007 resulted in no agreement between the parties. (N.T. 104-105).

4. Both counsel participated in a pre-hearing telephone conference on March 27, 2007 during which there was general agreement about the issues to be decided by the Hearing Officer.

5. The Hearing Officer received and admitted Exhibits P-1 through P-18 (N.T. 44, 94-95) and SD-1 through SD-6. (N.T. 92).

6. Parents called one witness: Mother. The School District called two witnesses: the Supervisor of Gifted Services and a Speech Pathologist.

#### Prior Due Process as to Gifted Status

7. On November 15, 2005, a gifted written report issued by the School District recommended that the Student was not eligible for the gifted education program. (*See* SD-3, SD-4).

8. Parents arranged for an evaluation by Dr. G. showing that the Student's scores in certain areas of functioning were inconsistent but that Student's abilities were consistent with an identification as "gifted." (P-1).

9. The Dr. G IEE dated April 11, 2006 recommended that Student be seen by Ms. Y "to further examine his inconsistency in auditory processing and to determine whether he would benefit from auditory retraining in the Fast Forward program." (P-1, p. 12).

10. At the July 19, 2006 due process hearing requested to determine whether Student was eligible for the gifted program, Parents provided to the School District a copy of the Ms. Y IEE. (SD-2, p. 1; N.T. 27-28).

11. Eventually, in September 2006, the parties reached a settlement agreement which provided, *inter alia*, that Student would be placed in the gifted education program. (P-18, N.T. 94-95).

### Ms. B. Evaluation

12. Parents requested a speech and language evaluation by letter dated April 21, 2006. (P-2).

13. After the Dr. G IEE was shared with the School District, a permission to evaluate dated April 24, 2006 proposed to conduct a CELF (Clinical Evaluation of Language Fundamentals) and an APAT (Auditory Processing Abilities Test). Parents consented. (SD-1).

14. By email dated May 2, 2006, Ms. B, M.S., CCC-SLP confirmed receipt of the Parents' permission to evaluate. Ms. B communicated that the screening test would determine if there were "red flags" to warrant a complete and thorough evaluation of Student. (P-5).

15. On May 17, 2006, the Ms. B initial evaluation report concluded that Student did not have a speech/language disability or an auditory processing disorder. According to the evaluator, Student was not a child with a disability. (P-6).

16. Parents never sent any written communications to the School District disagreeing with this May 17 evaluation report. (N.T. 40-42, 50).

17. The School District had no information that the Parents disagreed with the Ms. B report until after the Ms. Y IEE had been prepared and submitted. (N.T. 61-61).

### Ms. Y IEE

18. Ms. Y, M.S., FAAA, evaluated Student on June 9, 20, and 21, 2006. She concluded in her report dated June 2006 that he had a "mild-to-moderate high frequency sensorineural hearing loss, bilaterally" and "auditory processing deficits." (P-7, p. 5).

19. Ms. Y recommended, among other things, auditory training, the services of a speech-language pathologist and/or hearing therapist, preferential seating, evaluation by an otologist, and monitoring of his hearing and auditory development. (P-7, pp. 6-8).

20. Prior to securing the IEE, Parents never informed the School District of their intention to obtain an IEE and never requested the School District to pay for it. (N.T. 41-42).

21. The School District received a copy of the IEE on July 19, 2006. (N.T. 28).

22. The cost of Ms. Y's evaluation was \$1,650. (P-8).

23. Parents seek reimbursement for 333 miles to obtain the evaluation. (N.T. 27).

### Intermediate Unit Testing

24. On July 26, 2006, the School District forwarded a Permission to Evaluate Student for a Central Auditory Processing Disorder to be conducted by the Intermediate Unit. Parents consented on August 3, 2006. (P-9).

25. Student has an immaturely developed central auditory nervous system, based upon tests conducted by Audiologist Ms. P. (P-10, p.3).

26. In January 2007, the parties signed a Chapter 15 service agreement pursuant to Section 504 which provided accommodations in the form of preferential seating and repetition and clarification of directions as needed or requested. (P-13; SD-5).

27. There has been no finding by a court, a Hearing Officer, or the Appeals Panel that Student is disabled or in need of specially designed instruction within the meaning of IDEIA.

28. Student does not have an IEP and Parents have never requested an IEP meeting. (N.T. 35, 43).

### CONCLUSIONS OF LAW

1. Student is not a "child with a disability" under Section 602(3)(A) of the IDEIA, 20 U.S.C. §1401(3)(A).

2. Student is not in need of special education and related services as a child with a disability under IDEIA.

3. Section 504 does not provide for an IEE at public expense.

4. The School District has no legal obligation to pay for the IEE by Ms. Y.

5. Parents are not prevailing parties in this due process hearing.

## DISCUSSION OF ISSUES

### **1. Whether or not Parents entitled to reimbursement of the cost of an independent educational evaluation (IEE) of Student by Ms. Y, M.S., CCC-A/SP in the amount of \$1,650.00.**

Parents contend that the School District must pay for the Ms. Y IEE because the School District refused to conduct a full and complete evaluation of Student as required by the IDEIA. However, in this case, there has been no finding by a court, a Hearing Officer, or the Appeals Panel that Student is disabled or in need of specially designed instruction within the meaning of IDEIA. Further, there is no agreement between the parties that Student is disabled and/or in need of specially designed instruction under IDEIA. Instead, the parties voluntarily entered into a Section 504 Service Agreement. Unless Student is subject to IDEIA, those statutory provisions relating to an IEE at public expense are inapplicable.

This Hearing Officer believes that the case before her must necessarily involve consideration of any Section 504 obligations to reimburse the Parents for the costs of an IEE. References to regulations contained at 34 C.F.R. §300.502 governing independent educational evaluations in the context of IDEIA matters are simply not relevant authority.

Parents have cited no statutory authority under Section 504 authorizing reimbursement for the costs of an IEE. Similarly, the implementing regulations to Section 504 dealing with evaluations, at 34 C.F.R. §104.35, provide no basis for awarding reimbursement. The Chapter 15 Regulations which implement Section 504 requirements in Pennsylvania public schools likewise provide no legal authority for the awarding of reimbursement of the costs of an IEE. 22 Pa. Code §15.1 *et seq.* The regulations on parent-initiated evaluation and provision of services do not address the subject of an IEE at public expense in any manner.

22 Pa. Code §15.6. The procedural safeguards required under the Pennsylvania Regulations make no mention of independent evaluations at public expense. 22 Pa. Code §15.8.

Even if this Hearing Officer were to conclude that Student is entitled to all of the procedural rights due a gifted student, there is simply no legal basis to award reimbursement for an IEE. The Appeals Panel and Court decisions have consistently ruled that reimbursement for the costs of an IEE cannot be awarded. *See e.g.* Special Educ. Opinion No. 1664 (2005) (citing New Brighton Area School Dist. v. Matthew Z., 697 A.2d 1056 (Pa. Commw. Ct. 1997); Ellis v. Chester Upland School Dist., 651 A.2d 616 (Pa. Commw. Ct. 1994); Huldah A. v. Easton Area School Dist., 601 A.2d 860 (Pa. Commw. Ct. 1992)).

It should be noted that nothing in Ms. Y's report led to the development of an IEP under IDEIA, or any agreement or understanding that the Student was disabled and/or in need of specially designed instruction. On the issue of reimbursement of costs, it may be enough that a Student is found eligible under IDEIA as a direct result of the IEE, even though Student was not subject to IDEIA at the time that the IEE was requested. However, those are not the facts in this case.

Parents' efforts to use the Pennsylvania Statutory Construction Act to interpret two federal statutes are particularly erroneous. It may well be that IDEIA and Section 504 are meant to be complimentary federal statutes, but that certainly does not mean that if a student is entitled to Section 504 protections that all of the IDEIA provisions necessarily apply to that same student. Our United States Supreme Court has emphasized that Section 504 does not require affirmative action on behalf of disabled individuals, but merely requires the absence of

discrimination against those individuals. *See* Southeastern Community College v. Davis, 442 U.S. 397, 411, 60 L. Ed. 2d. 980, 99 S. Ct. 2361 (1979).

Finally, Parents argue that reimbursement for the costs of an IEE is permitted under W.B. v. Matula, 67 F.3d 484 (3<sup>rd</sup> Cir. 1995). That case involved an action brought under Section 1983 seeking money damages for alleged violations by a School District under IDEIA and Section 504. The Third Circuit ruled that money damages are a potential remedy for a Section 504 violation because there is explicit statutory authority under Section 504 which allows a complaining party to invoke the remedies, procedures and rights under Title VI of the Civil Rights Act of 1964. Money damages are an explicit remedy set forth under the statute. Matula did not authorize the awarding of reimbursement to Parents for the costs of an IEE. That is not a remedy under Title VI.

This Hearing Officer feels compelled to point out that even if Student were to be deemed to be a child with a disability in need of special education services, the Parents would not be entitled to reimbursement because they never disagreed with the Ms. B Evaluation Report and never requested the School District to pay for the costs of the IEE as required by regulation. 34 C.F.R. §300.502b(1) and (2).

For all of these reasons, the request for reimbursement of the costs of the Ms. Y IEE must be denied.

**2. Whether or not the School District must reimburse the Parents for the transportation costs in obtaining the Ms. Y IEE.**

For the same legal reasons explained above, the School District has no legal obligation to reimburse Parents for their transportation costs in obtaining the Ms. Y IEE.



**3. Whether Parents are entitled to attorney's fees?**

Quite simply, the Hearing Officer has no authority to order attorney's fees and certainly would not do so when Parents have not prevailed.

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Parents are not entitled to reimbursement for the Ms. Y IEE. The case is DISMISSED.

Date: May 9, 2007

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