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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: Student
ODR #7725/06-07 AS

Date of Birth: September 2, 1990

Date of Hearing:
July 23, 2007

OPEN HEARING

Parties to the Hearing:

Mr.

Ms.

Pocono Mountain School District
PO Box 200
Swiftwater, Pennsylvania 18370

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Brian Ford, Esquire
KingSpry
One West Broad Street, Suite 700
Bethlehem, Pennsylvania 18018

August 8, 2007

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Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old eligible student who attended [redacted vocational school] (hereinafter Vocational School) under the auspices of the Pocono Mountain School District (hereinafter District). Mr. and Ms., Student's parents (hereinafter Parents) wish to obtain Student's educational records, believe that records have been withheld, and asked for this hearing¹ to compel release of all their son's records to them for purposes of educational planning and to determine whether their son received FAPE.

At the due process hearing it was determined that the sole issue was the Parents' access to Student's records. Although the parties seemed to have reached an agreement, when the agreement was being read into the record the Parents indicated their disagreement with what constituted an educational record. (NT 18) No testimony was taken, although the parties were invited to submit briefs regarding the legal definition of "Education Records". (NT 19)

This decision, therefore deals with what is to be considered an "Education Record" and exactly what materials/items the District and its subcontractor(s) are required to make available to the Parents.

Issue

What educational records are the District and its subcontractor(s) obligated to make available to Student's Parents?

Findings of Fact

There was no testimony, and exhibits were not introduced. Therefore no findings of fact are provided.

Discussion and Conclusions of Law

Legal Basis

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Having been found eligible for special education, 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

¹ A complaint against Vocational School was dismissed.

Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE).

Hearing officers are empowered to hear and render decisions on special education issues under the IDEA, and on such 504 issues as are pertinent to accommodating a protected handicapped student so that the student can access his/her educational program. Hearing officers have no jurisdiction over cases brought pursuant to the Family Educational Rights and Privacy Act of 1974 (FERPA) or over civil rights cases.

The Parents brought this hearing under Section 504 of the Rehabilitation Act of 1973 as well as under the IDEIA. All claims arise out of the same facts alleged under the IDEA claims, and they are subject to the same statute of limitations as applied to the IDEA claims. There is ample authority that where the parents did not show a distinct issue, such as accessibility, the disposition of the IDEA claim resolves the alternative 504 claim.² (Special Educ. Opinion No. 1724 (2006))

“Education Record” is not a term defined in the definitions provided in the IDEA 2004. 20 U.S.C. 1401(1)-(36) The IDEA 2004’s implementing regulations provide for parental access to records in preparation for a due process proceeding in that the LEA must “permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under [the IDEA 2004 implementing regulations].” 34 C.F.R. 300.613

The implementing regulations do define the term “educational records,” but only by stating that educational records are “the type of records covered under the definition of “education records” in 34 C.F.R. 99 (the regulations implementing the, 20 U.S.C. 1232(g)” (FERPA). 34 C.F.R. 300.611

Given that the IDEA 2004’s implementing regulations refer to FERPA for a definition of “Education Records” this hearing officer will reference that definition, while reiterating that she has no jurisdiction over FERPA matters per se. The FERPA definition reads as follows:

“Education records--

(a) The term means those records that are:

- (1) Directly related to a student; and
- (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

- (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
- (2) Records of the law enforcement unit of an educational agency or institution,

² See, e.g., Alexis v. Dallas Indep. Sch. Dist., 286 F. Supp. 2d 551 (N.D. Tex. 2004); Corey H. v. Cape Henlopen Sch. Dist., 286 F. Supp. 2d 380 (D. Del. 2003); Gregory R. v. Penn Delco Sch. Dist., 262 F. Supp. 2d 488 (E.D. Pa. 2003).

subject to the provisions of § 99.8.

(3)

(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution." 34 C.F.R. 99.3

Discussion

The FERPA definition of Education Records carefully delineates what is an Education Record: those records that are ***directly related to a student, and maintained by an educational agency or institution or by a party acting for the agency or institution.*** FERPA also defines what is not an Education Record.

On July 5, 1995 (revised on January 3, 2001) the District adopted a policy (No. 216) regarding Student Records. The policy provides that, "Only records mandated by the Commonwealth or federal government or specifically permitted by this Board may be compiled by the staff." The policy states,

"The Board hereby authorizes the following pupil records:

1. Observations and ratings of individual pupils by professional staff members acting within their sphere of competency and responsibility.

2. Health records as required by law.

3. Samples of pupil work.

4. Information obtained from authorized standard instruments of measurement, such as aptitude tests, vocational preference inventories, achievement tests, and intelligence tests.

5. Authenticated information provided by a parent or pupil concerning

achievements and other school activities which the pupil wants to make a part of the record.

6. Verified reports of serious or recurrent behavior patterns.

7. Extracurricular activities and achievements.

8. Rank in class and academic honors earned.”

Finally, in regard to transfer students, and inferentially applied to students in the District, the policy provides that student records also include,

“a...copy of the student's disciplinary record... shall be maintained as part of the student's permanent disciplinary record”.

Pursuant to its policy on Student Records, the District issues an annual “Student Records Policy Notice”. This notice echoes the FERPA definition, *“Educational Records include records directly related to a student that are maintained by the School District.”*

The District’s Student Records Policy Notice provides a listing of “Educational Records of the District”, as follows, while also noting that this list is not intended to be exhaustive:

“...grades, standardized test results, student evaluation reports, samples of student work, records transferred from sending schools, discipline records, medical records and any other records created and maintained by the school district directly related to the student.”

Additionally, the Annual Notice notes,

“Per federal guidance, student medical records, maintained by the nurses’ office, are considered educational records...”

The District’s Annual Notice also notes that, *“Educational records do not include communications with legal counsel that are attorney client privileged. Educational Records do not include records maintained solely by the creator for their personal use, not shared with others.”*

Furthermore, the District’s Annual Notice provides that, *“The contents of a student’s educational file shall be determined by the District unless a specific parental request is made or a complaint is made, consistent with this Notice”* and that *“In accordance with FERPA the District will not produce or compile documentation that does not already exist.”*

Based upon the guidance offered above, this hearing officer has determined that Education Records are: **grades; report cards; rank in class and academic honors earned; extracurricular activities and achievements; summary attendance records; official transcripts; summary scores from standardized testing either individually or group**

administered³; Evaluation and Reevaluation Reports (ERs, RRs); reports of psychological evaluations, psychiatric evaluations, and evaluations by supportive services professionals (e.g. speech/language evaluation reports, mobility evaluation reports, vocational evaluation reports)⁴; Individualized Education Plans (IEPs); Notices of Recommended Educational Placement (NOREPs); discipline records including disciplinary notices and notices of detention/suspension; medical records and nursing records; counseling records; and records of specialists providing supportive services⁵, and, records transferred from sending schools. As tests/quizzes provide samples of pupil work, the School Board's inclusion of "samples of pupil work" is interpreted by this hearing officer to be **teacher-made tests/quizzes and tests/quizzes made by textbook publishers, as well as copies of assignments read/corrected by the teacher and returned to the student (e.g. essays, research projects), and/or any other record specifically delineated as being an education record in current or future federal, state, or District regulations and/or policies.**

This hearing officer has determined that the following are not Education Records: **protocols from standardized testing; daily or classroom sign-in/sign-out sheets; handwritten/typewritten/email correspondence between teachers and administrative staff, among administrative staff, and/or between/among teachers/administrative staff and parents; personal teacher notes made for the purpose of recording/remembers the student's day to day progress or serving as a reminder of a plan for working with the student; raw notes of observations of the student; raw notes taken by evaluators; handwritten annotations on draft ERs, RRs and/or IEPs; IEP meeting notes made by individual participants to aid individual recollection; and/or any other record specifically delineated as not being an education record in current or future federal, state, or District regulations and/or policies.**

The Parents represent that Student's IEP team specifically had added to Student's IEP an SDI that the parents would receive daily written communication of his performance and a copy of all tests/quizzes. This addition was, according to the Parents' report, made following a December 18, 2006 letter from Student's treating physician, [Dr. J.], M.D. who had seen the student once weekly for one year. In his letter Dr. J indicated the need for the Parents to receive daily and frequent information about Student's in-school performance, specifically the need for, "*Consistent, timely, and frequent parental communication and updates to provide feedback regarding all aspects of the child's performance. It is essential for the parents to know Student's progression and/or setbacks to ensure they are addressed in a timely and appropriate manner, thereby deterring further regressions.*"

³ Some of this material may be combined, for example, grades, attendance and timeliness are generally noted on report cards.

⁴ Frequently these reports are not separate documents, but are incorporated into ERs and RRs.

⁵ Records of supportive services professionals and counseling records are often confined to brief notations of the date of service and length of service sessions.

Teacher-made and textbook publisher's tests/quizzes are usually given back to students to take home, although it is a given that students do not always present tests/quizzes to their parents. It is therefore acceptable for the IEP team to decide that the teacher(s) of a particular student will forward completed tests/quizzes to a designated individual who will then transmit them to the student's parents on a pre-determined schedule, such as once a week, rather than giving them to the student to take home, in order to ensure that parents have received them. If an IEP team determines that this procedure is appropriate, it should be written into the student's IEP. A similar procedure may be followed for checklists of task competence in a vocational program if such checklists are routinely provided to students to take home. It should be noted that protocols from standardized testing are not included, as outlined above.

Prior to the due process proceedings, and on the day of the hearing, the hearing officer ordered the District and its subcontractor to produce any and all records pertaining to Student. The scope of the records produced was broad, and went beyond the delineation now provided by the hearing officer in this decision. As discussed on the day of the hearing, this hearing officer's previous order for production of records is retroactive, that is, if the District or Vocational School discovers any records in its possession of which it was not aware, except for those items that had been excluded by the hearing officer, copies of the records must be given to the Parents.

However, this hearing officer's previous order is not prospective, that is, from this day forward the District and its subcontractor will be required to provide the Parents only those items designated as Education Records in this decision. The District and its subcontractor(s) are not required to provide the items/materials designated as not being Education Records.

Order

It is hereby ordered that:

1. The District and/or its subcontractor(s) shall make Education Records regarding Student available to his Parents as follows:

Grades; report cards; rank in class and academic honors earned; extracurricular activities and achievements; summary attendance records; official transcripts; summary scores from standardized testing either individually or group administered; Evaluation and Reevaluation Reports (ERs, RRs); reports of psychological evaluations, psychiatric evaluations, and evaluations by supportive services professionals (e.g. speech/language evaluation reports, mobility evaluation reports, vocational evaluation reports); Individualized Education Plans (IEPs); Notices of Recommended Educational Placement (NOREPs); discipline records including disciplinary notices and notices of detention/suspension; medical records and nursing records; counseling records; and records of specialists providing supportive services, and, records transferred from sending schools; teacher-made tests/quizzes and tests/quizzes made by textbook publishers; and, copies of assignments read/corrected by the teacher and returned to the student (e.g. essays, research projects).

2. The District and/or its subcontractor(s) are not required to make the following materials/items available to the Parents:

Protocols from standardized testing; daily or classroom sign-in/sign-out sheets; handwritten/typewritten/email correspondence between teachers and administrative staff, among administrative staff, and/or between/among teachers/administrative staff and parents; personal teacher notes made for the purpose of recording/remembering the student's day to day progress or serving as a reminder of a plan for working with the student; raw notes of observations of the student; raw notes taken by evaluators; handwritten annotations on draft ERs, RRs and/or IEPs; and, IEP meeting notes made by individual participants to aid individual recollection.

August 8, 2007

Date

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Hearing Officer