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## Pennsylvania Special Education Hearing Officer

### DECISION

Child's Name JN

Date of Birth: xx/xx/xx

Dates of Hearing:  
8-8-07, 8-29-07, 1-17-08  
CLOSED HEARING  
ODR #7755/06-07 KE

Parties to the Hearing:

Mr. and Mrs.

Upper Dauphin Area School District  
5668 State Route 209  
Lykens, PA 17048-8414

Representative:

Pro Se

Stephen S. Russell, Esquire  
Stock and Leader  
Susquehanna Commerce Center East  
221 West Philadelphia Street, Suite 600  
York, Pa 17401-2994

Date Record Closed:

February 22, 2007

Date of Decision:

March 8, 2008

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION AND PROCEDURAL HISTORY

Student is a xx year old child who resides in the Upper Dauphin School District, (S-4 p. 3), and was disenrolled on August 3, 2007, (NT 21). During the 2006-2007 school year, the Student was enrolled in the District, and was s student at the [redacted] Elementary School. (NT 23.) The Student is eligible for special education and related services as a child with multiple disabilities, Specific Learning Disability, Speech and Language Impairment and Visual Impairment. (S-30 p. 28.) The Student has been diagnosed with cerebral palsy, developmental dysplasia of the hips, and a visual impairment. (S-3.)

Mr. and Mrs. (Parents) requested due process on May 22, 2007, requesting compensatory education for the 2006-2007 school year, removal of an IEP from the Student's educational records, and an order for ESY on an expedited basis. On June 25, 2007, the Parents filed another request for due process, seeking the above relief, as well as an order that the June 2007 IEP was inappropriate, and an order that the District identify all names of persons evaluating the Student. The matter was bifurcated so that the ESY issue could be decided on an expedited basis, that issue was assigned to another hearing officer, (3NT<sup>1</sup> 98.), and the remaining issues were listed for a hearing on August 8, 2007 before Special Education Hearing Officer Joy W. Fleming, Esquire. By order dated August 17, 2007, Hearing Officer Fleming dismissed as moot the issue of appropriateness of the 2007-2008 program and placement, because the Student had been disenrolled from the District. (NT 21-22, 133; HO-1.)

Hearing Officer Fleming presided in an additional hearing on August 29, 2007. Subsequently, Hearing Officer Fleming resigned as a hearing officer, and the matter was assigned to the undersigned to preside in a third and final hearing session on January 17, 2008, and file a decision. The parties agreed to submit written summations on February 22, and did so, at which time the record closed.

The Parents argue that the District failed to provide FAPE by reason of its refusal to implement what they argue was the prevailing IEP, a document from 2004. (NT 12-13.)

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<sup>1</sup> Since the last volume of the transcript, the January 17, 2008 hearing session, is not paginated consecutively, this will be referred to as "3NT."

They assert that, instead, the District planned to implement an IEP from 2005, which had been found inappropriate by a special education hearing officer. (NT 13.) The District asserts that it provided an offer of FAPE, and all special education programming possible, but that the Parents obstructed and prevented the provision of FAPE. (NT 16-17.)

#### ISSUES

1. In the 2006-2007 school year, did the District fail to provide FAPE to the Student?
2. Was the District's failure to identify its evaluator a denial of FAPE?
3. Was the District's refusal to remove the 2006 IEP from the Student's records a denial of FAPE?
4. Did the Parents prevent the District from providing FAPE?
5. Should the hearing officer award compensatory education for the 2006-2007 school year?

#### FINDINGS OF FACT

1. By Decision dated October 6, 2005, Special Education Hearing Officer Marcie Romberger found that the IEP offered by the [redacted former] School District, dated September 2004 IEP was inappropriate for failure to provide an accessible classroom to the Student and to include a goal for wheelchair use in the classroom, for failure to adequately train the Student's 1:1 aide, and for failure to provide adaptive equipment and assistive services at school. (S-1, S-2 p. 5 n. 2.)
2. Hearing Officer Romberger also found that the Parents during the time in question had repeatedly denied the District access to information necessary for developing a program for the Student. (S-3 p. 8.)
3. By Decision dated January 16, 2006, Special Education Hearing Officer Daniel Myers found that the Student needed related services and denied the

Parents' request for an order that the [redacted former] School District not provide Occupational Therapy, Physical Therapy and vision therapy services. (S-2.)

4. Hearing Officer Meyers found that the Parents during the relevant period had held the Student out of his classroom habitually, to prevent receipt of the disputed services. (S-2.)
5. By Decision dated June 21, 2006, Special Education Hearing Officer Gregory J. Smith found that an IEP offered by the [redacted former] School District was not appropriate because the district failed to prove that it was necessary, first, to move the Student from full time general education with supports to part time learning support; and second, to change the related services to partial pull-out services. (S-3 p. 8.)
6. Hearing Officer Smith found that the September 2004 IEP was the last agreed-upon IEP. (S-3 p. 2.)
7. Hearing Officer Smith found that Parents withheld evaluative information from the district and prevented the student from receiving related services by withholding him from class. (S-3 p. 4, 5.)
8. Hearing Officer Smith found that "what [was] needed" was a comprehensive evaluation followed by an IEP process. He found that the district had been unable to propose an appropriate IEP for the Student because it did not "have a clear picture of [the Student's] need ... ." (S-3 p. 9-10.)
9. By Decision dated January 17, 2007, Special Education Hearing Officer Lynda A. Cook, Ed. D., ordered the District to conduct an initial evaluation of the Student. (S-4.)
10. Hearing Officer Cook found that the September 2004 IEP was the last agreed-upon IEP. (S-4 p. 5.)
11. Hearing Officer Cook found that "an evaluation is necessary to determine [the Student's] disabilities

so that the District can provide an appropriate education program. Currently, no clear statement of Student's disabilities or need for special education and related services is available to the District." (S-4 p. 10.)

12. By Decision dated February 26, 2007, the Special Education Appeals Panel upheld the order of hearing officer Cook, finding that the "parents ... seem to believe that they can abrogate the order of one Pennsylvania hearing officer to conduct an evaluation by [shopping] 'for a friendly venue.' The Panel found that the Parents' actions had made a "mockery" of the due process system. In re Educational Assignment of J.N., Spec. Educ. Op. 1801 at 8 (February 26, 2007). (S-5 p. 8.)
13. The Parents enrolled the Student in the [redacted second former] School District in July 2006, then moved to the Upper Dauphin Area School District. (S-4 p. 5.)
14. The Parents registered the Student with the District at the Elementary School on August 18, 2006. (NT 19.)
15. At the time of registration, the District asked the Father to provide information about and copies of any IEPs. (NT 19-24; S-9.)
16. The Father disclosed that there were IEPs, and provided an IEP cover page from the September 2004 IEP, but refused to provide further documentation, to authorize the District to obtain information, or to identify the school district previously responsible for the IEPs. (NT 22; S-9, p. 1.)
17. The Parents intended to prevent the District from obtaining information about the Student's special education placement and services in the previous school year. (P-17 p. 4.)
18. The District obtained the name of the previous district of residence, [redacted second former district], and contacted it for records in August 2006. The district had difficulty obtaining records because of the Student's brief enrollment at

[redacted second former] School District. (NT 24, 43, 3NT 66-69; S-4 p. 3, S-9 p. 4.)

19. The District had a report card from the [redacted former] School District that they interpreted to suggest an intention in that district to place the Student in a learning support class. (3NT 59-63.)
20. At a meeting on August 24, 2006, the Parents refused all special education services. (NT 72-73, 3NT 15-18, 21-23, 59-65, 67, 71, 78-80, 100; S-10, S-11.)
21. The District proposed placing the Student in a diagnostic program through the Capital Area Intermediate Unit, through a NOREP offered on August 24, 2006. (3NT 59-63; S-4 p. 3.)
22. Parents disagreed with the recommended placement, and wrote on the NOPREP: "We want [Student] to have the opportunity to try to be successful in regular ed setting and review progress in 30 days." (S-4 p. 3.)
23. Parents also rejected a learning support placement and refused to permit a comprehensive evaluation. (3NT 60; S-4 p.4.)
24. In the absence of adequate information, the District's principal was concerned with the student's need for daily living assistance and with potential safety issues. (3NT 60-61, 64.)
25. The District offered a 504 Service Plan with a 1:1 aide and the Parents accepted. The Plan specified seven services, limited to physical assistance and specifically forbidding intervention by the teacher or 1:1 aide for any other purpose. (3NT 18-20, 60-65; S-4 p. 4.)
26. In September and again in October 2006, the District requested permission to evaluate. (S-4 p. 4.)
27. The District received educational records from [redacted second former school district] in October 2006. (S-4 p. 5.)

28. The Parents refused to permit evaluation unless they should be permitted to observe the Student in the classroom and observe all assessments. (NT 74; S-4 p. 6.)
29. When interviewed by a privately retained clinical psychologist, the Parents confided that they are reluctant to allow the Student to be placed in learning support because they believe that he will learn less there than in the general education setting, basing this in part on their belief that the Student had become overly dependent upon his educational aide in the general education setting, and that school staff in general were offering too much assistance and influencing the Student to be too dependent. This was the belief that caused the parents' repetitive interference with any attempt to provide special education services to the Student. (3NT 41, 81-82, 93-95, 100, 188; P-4.)
30. The private clinical psychologist, in a report dated September 26, 2006, recommended placement in a learning support environment. (P-4 p. 9.)
31. Throughout the 2006-2007 school year, Parents repeatedly communicated with the Student's teachers and other staff, attempting to control the activities and physical location of the educational Aide in the classroom, as well as attempting to micro-manage the teacher's activities. This included chiding the teacher and keeping the Student home from school. (3NT 20, 23-32, 35-47, 69-77, 80-82, 87-88.)
32. The District requested due process to compel evaluation, and on February 26, 2007, the Appeals Panel ordered an evaluation. (S-5.)
33. By report dated March 19, 2007, the Special Education Adviser for the Bureau of Special Education, Division of Compliance, Monitoring and Planning, determined not to award compensatory education for the 2006-2007 school year, and ordered the District to propose an interim IEP pending the evaluation that was ordered by the Appeals Panel. (P-17.)

34. The District convened an interim IEP meeting on April 3, 2007. The meeting was highly contentious and hostile, and the team was unable to decide on all the issues before it. (3NT 93, 135-138; P-19, S-27.)
35. At the meeting, the team decided to provide placement in the general education setting with itinerant learning support. The Parents appeared to one witness not to disagree with the placement, but they resisted the offered related services. (3NT 119-120; P-19, S-27.)
36. The interim IEP contained goals addressing mobility. (S-27.)
37. The Parents subsequently rejected the NOREP. (3NT 164-165.)
38. By report dated May 30, 2007, the Adviser found that the District failed to provide an interim IEP in a timely fashion. He also provided evidence that the Parents had refused all special education services at a meeting convened for the purpose of creating an interim IEP, and had withheld information from the District. (P-19.)
39. In June 2007, the Parents changed their position and criticized the District for not providing special education services. (3NT 100-101.)
40. The District's principal believed that the Parents prevented the District from providing special education services. (3NT 103.)

#### DISCUSSION AND CONCLUSIONS OF LAW

The District was and is obligated to provide the Student with a free and appropriate public education ("FAPE"), in accordance with an Individualized Education Plan reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). "The education provided must be sufficient to confer some educational benefit upon the



handicapped child." L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Since the Parents here are challenging the provision of FAPE, they are the moving party and they bear the burden of persuasion in the administrative hearing. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

Compensatory education is an appropriate remedy where a district has failed to provide a student with FAPE under the IDEA. M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990), cert. denied, 488 U.S. 923 (1991). Where an IEP confers only trivial or de minimis educational benefit, the student has been denied FAPE and is entitled to compensatory education. M.C., supra. The period of compensatory education is equal to the period of deprivation, and accrues when the District knows, or has reason to know, that the student is not receiving an appropriate education. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

#### The Existing IEP on August 24, 2006

Chapter 14 of the Pennsylvania Code provides:

If a student with a disability moves from one school district in this Commonwealth to another, the new district shall implement the existing IEP to the extent possible or shall provide the services and programs specified in an interim IEP agreed to by the parents. The interim IEP shall be implemented until a new IEP is developed and implemented or until the completion of due process proceedings under this chapter.

22 Pa. Code §14.131 (a)(3).

Thus, when the Student enrolled in the District, the District was obligated to identify the "existing" IEP and implement it, or offer an interim program and placement.

The hearing officer concludes that the "existing" IEP in this matter was the last agreed upon IEP, the September 2004 IEP. (FF 1, 6, 10.) However, the District's obligation was not to implement that IEP without further question; it was obligated to implement that IEP "to the

extent possible." 22 Pa. Code §14.131 (a)(3). Here, it was not "possible" on August 24, 2006, or thereafter, to implement the existing IEP, for three reasons.

First, that IEP had been found inappropriate by Hearing Officer Romberger in 2005. (FF 1.) This was due to several deficiencies, including training of staff at the prior school district. Although the deficiencies cited in Hearing Officer Romberger's decision could have been supplied by the District in implementing the September 2004 IEP, these would have required an IEP process leading to an amended IEP; thus, by legal definition, it was not possible to implement the September 2004 IEP. Moreover, in reality it was not possible to do so legally because the Parents refused all special education services, thus making an IEP meeting or process impossible. (FF 20.)

Second, two special education hearing officers and an Appeals Panel had found that it was necessary to evaluate the Student before proposing a program and placement for him. (FF 8, 9, 11, 12.) According to these findings, there was not a reasonable basis within the knowledge of the District at that time, permitting it to propose an appropriate IEP. (FF 11.) The 2004 IEP was too old to be an appropriate template for the provision of services, (3NT 159), and successive hearing officers were unanimous that sound practice required a new evaluation. Under these circumstances, the District was under both a legal and a professional obligation to evaluate the Student before simply following the Parents' demands that he be placed in a general education environment without further question. It was not possible to do so because it would not have been appropriate, given the District's lack of knowledge at the time. (FF 13-19, 24, 27.)

This inappropriateness was partially the product of the Parents' behavior. The record is preponderant that the Parents refused to provide the District with necessary information about the Student's special education needs and prior services. (FF 13-19, 24, 27.) This put the District in a position of "flying blind" - trying to make programming decisions about the Student without necessary information that the Parents could have supplied or whose acquisition the Parents could have facilitated. Under these circumstances, the hearing officer finds that the District appropriately proposed various forms of assessment and evaluation for the Student, all of which the Parents refused. (FF 20, 21, 23, 26, 28.)

Third, implementation of the September 2004 IEP was not possible because the Parents refused to cooperate at

all. (FF 2-4, 7, 12, 13, 15-23, 26-29, 32.) The Parents claim before this hearing officer that they desired only a fully inclusive environment, (HO 2)<sup>2</sup>; however, the evidence is preponderant that, during the 2006-2007 school year, the Parents did not want - or at least communicated their refusal of - any special education or related services for the Student, with the narrow exception of the 504 Service Agreement that they permitted to be implemented. (FF 25.) The Parents used a variety of strategies to resist special education for the Student, including "forum shopping" with various districts, due process requests, and appeals. They were found to have "made a mockery" of the due process system for that purpose. (FF 12.)

The hearing officer finds that the Parents' assertion to the contrary - that all they wanted in August 2006 was an inclusive setting with supports - is not credible. (NT 150, 152, 154-158.) It is contradicted by what is undisputedly their handwritten statement on the August 2004 NOREP, which stated plainly that they preferred at that time to let the Student try general education without supports, and monitor his progress. (FF 21.) It is contradicted by the heavy weight of the contrary testimony of District personnel at the hearing in this matter, corroborated by contemporaneous documentation of the Parents' behavior, proving that the Parents refused every kind of special education services at that time, and refused to provide necessary information to the District. (FF 20.)<sup>3</sup> It is contradicted by a longstanding history of contrary behavior by the Parents in more than one school district, in more than one due process hearing, and in more than one BSE investigation complaint, all resisting special education services. (FF 1-12.) It is contradicted by contemporaneous statements made by the Mother to the psychologist she selected for the purpose of advice on the educational needs of the Student; to this professional, the Mother confided that she felt that special education supports were teaching her child to be dependent, thus revealing her conscious motivation for the Parents' litigious and contradictory behavior over the years. (FF 29.)

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<sup>2</sup> The hearing officer marks as "HO-2" the written summation of the Parents, and as "HO-3" the written summation of the District.

<sup>3</sup> The Parents deny failing to provide adequate information to the District at this time, pointing to the NOREP that they rejected, which has language indicating review of an IEP. (HO-2.) The hearing officer finds that this terse reference, (S-11), does not outweigh the contrary evidence. Even if the District reviewed this document, they could be expected to not give it determinative weight, in the absence of more information as to its significance, because it was indeed outdated on its face. (NT 81-82.)

In sum, the District did not fail to implement the prevailing IEP - the September 2004 IEP - "to the extent possible", as required in the state regulation. It was not possible to implement that IEP; what was necessary was an evaluation or at least more extensive assessments, with subsequent IEP revision, and the Parents obstructed this course for almost the entirety of the year in question. (FF 32.)

In making this finding, the hearing officer relies in part upon findings and decisions by previous hearing officers as well as material and findings contained in Complaint Investigation Reports. The hearing officer accepts these findings and factual statements as evidence only; he does not reach the question, not raised by the parties, whether or not he is bound by any of the findings in question. Rather, he weighs all of this evidence with the other parts of the record in this case, a record which was extensive. Although he does not consider the hearing officer findings as hearsay, but rather as facts in their own right, the hearing officer specifically is cognizant of the hearsay embedded in some of the CIRs upon which he has relied. As to each of those matters of hearsay, which under our rules are admissible and can form part of the predicate for a finding, Dispute Resolution Manual §909, the hearing officer considers it supported by substantial non-hearsay evidence, and thus within the ambit of reliance permitted by our rules.

#### Interim IEP

The regulation provides that if following the prevailing IEP is not possible, the district is obligated to offer an interim IEP. This the District failed to do. (FF 38.) The Special Education Advisor, by decision dated March 19, 2007, ordered them to do so.

The District convened an IEP meeting on April 3, 2007 for this purpose, and the evidence was mixed as to what transpired. The District witnesses stated that the Parents were obstreperous and hostile, that the Principal left the room at one point because of this behavior, and that the team was not able to accomplish what they had hoped as a result. The Parent admitted that things became heated, but argued that he was being reasonable and accepting of services. (NT 159-167.) The CIR later issued about this meeting found that the Parents had refused all services. (FF 38.) An IU employee who was at the meeting did not remember that the Parents had refused any services. (NT

120.) The Parents refused the NOREP, even though it would have placed the Student in the general education environment with itinerant learning support, the placement that they have contended is what they wanted. (FF 36, 37.)

The hearing officer was impressed with the one witness who corroborated the Parent's depiction of his acceptance of services at the April meeting. However, her testimony was framed in terms of lack of memory, and she lacked good memory of the meeting in general. Given the weight of evidence that this was a memorable meeting to say the least, the hearing officer gives this testimony little weight, and finds that the evidence is preponderant that the Parents refused the services offered at this meeting.

#### Compensatory Education

Compensatory education is an equitable remedy to restore services to which a student was entitled and which were denied to him. Where parental interference or obstruction is evident, there should be a balancing of the equities in determining the extent of the compensatory award. In re the Educational Assignment of T.W., A Student in the Kutztown Area School District, Special Education Opinion No. 1224 (April 1, 2002). In considering the equities, this hearing officer will "accor[d] ample latitude for parental passivity and advocacy." M.C., supra at 18. Nevertheless, where the Parent's conduct has "become more than simply misguided," In re the Educational Assignment of E.V., A Student in the Easton Area School District, Special Education Opinion No. 1333 (February 28, 2003), the equities will balance against compensatory relief.

In this hearing officer's view, the prime equitable consideration is the need of the Student. However, the equity must also weigh fairness to the District. Therefore, the hearing officer is cognizant of the equitable principle that those who seek equity must do equity.

Here, the need of the Student in itself is great. However, the Student is no longer in the District; thus, it is unclear how that need could be addressed, and there is no current data on the extent of need at this time. Balanced against this is the Parents' sometimes obstreperous obstruction of the District's attempts to provide special education services in this matter. Under these circumstances, the hearing officer will not award compensatory education, because the District was unable,

despite its reasonable attempts, to provide FAPE. (FF 39, 40.)

#### Removal Of Iep Reference

The Parents ask that the hearing officer find that the District's refusal to remove from the Student's educational file all reference to a January 2007 IEP, was a denial of FAPE. (HO-2.) The hearing officer declines to do this. It is not within his jurisdiction to determine what records a school district should maintain. Moreover, it is not possible nor is it appropriate to sanitize an educational record as the Parents desire. Rather, this decision, and the long trail of decisions that precede it, will serve to correct the record if indeed it needs correction.

#### Listing of Evaluators

The hearing officer is unaware of any authority that the District is required to list every person who participated in the evaluation of a child. The IDEA and federal and state regulations speak in terms of the required participants, not whom should be identified. This request will be denied.

#### ORDER

1. In the 2006-2007 school year, the District did not fail to offer FAPE to the Student.
2. The District's failure to identify all of its evaluators was not a denial of FAPE.
3. The District's refusal to remove the 2006 IEP from the Student's records was not a denial of FAPE.
4. The Parents prevented the District from providing FAPE during the entire 2006-2007 school year.
5. The hearing officer will not award compensatory education for the 2006-2007 school year.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

March 8, 2008

