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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

ODR File No.: 7852/06-07 AS
Student: D.S.
School District: Harrisburg
Type of Hearing: Open

For the Student:

For the School District:

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Keith Imboden
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Hearing Date:	September 5, 2007
Date of Receipt of Transcript:	September 10, 2007
Decision Date:	September 24, 2007
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a xx year old resident and former student of the School District who has already obtained a compensatory education award due to the School District's failure to provide a free appropriate public education to Student during the 2004-2005 and 2005-2006 school years. Student now seeks additional compensatory education services for the same time period, based upon after-acquired evaluation reports and procedural failures that allegedly were not considered by either the previous hearing officer or appeals panel. For the reasons described below, I agree with the School District that Student's claim for additional compensatory education is barred by the doctrine of res judicata.

ISSUES

- Is Student's claim for additional compensatory education barred?
- If Student's claim for additional compensatory education is not barred, is Student entitled to additional compensatory education?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a xx year old resident of the Harrisburg School District (School District). (SD 2; P12) ¹ Student attended the School District's public schools throughout the 2004-2005 and 2005-2006 school years, and into the 2006-2007 school year until November 2006. (N.T. 10) While Student still lives within the School District's boundaries, he currently is enrolled in a cyber-charter school. (N.T. 68)
2. On October 30, 2006, Hearing Officer Valentini issued a Decision and Order finding that the School District failed to provide Student a free, appropriate public education (FAPE) during the 2004-2005 and 2005-2006 school years. (N.T. 9, 11; SD 2; SD 3, p.4) As an equitable remedy to bring Student to the position that he would have occupied but for the School District's denial of FAPE, Hearing Officer Valentini ordered the School District to provide compensatory education in the form of the services of a private learning coach/tutor who would meet with Student regularly and address areas that include: study skills; organization of time and materials; quiz/test preparation; project and homework completion; and subject matter instruction in math and written expression. (SD 2, pp.13, 15)
3. Student appealed Hearing Officer Valentini's decision and sought additional compensatory education services, arguing that: 1) the hearing officer had erred in

¹ References to SD, P and HO, are to the School District, Parent, and Hearing Officer exhibits, respectively. References to N.T. are to the transcript of the September 5, 2007 hearing session.

- concluding that Student no longer required reading instruction; and 2) Student's needs pervaded his entire school day, thereby requiring more compensatory education services than the Hearing Officer had awarded. (SD 3, p.4) On December 12, 2006, the Appeals Panel affirmed the Hearing Officer's decision and dismissed Student's exceptions to the Hearing Officer's decision. (SD 3)
4. In the meantime, the parties had already agreed to an independent educational evaluation (IEE) to be conducted at public expense. (SD2, p.14) Hearing Officer Valentini noted in her October 30, 2006 decision that this IEE was in process at the time of her due process hearing, and that the IEE would be considered by the parties when they determined Student's special education program and placement for 2006-2007. (SD2, p.14; N.T. 9-10) As I noted earlier, however, Student stopped attending the School District's public schools in November 2006, and while he still lives within the School District's boundaries, he currently is enrolled in a cyber-charter school. (N.T. 10, 68)
 5. On October 26, 2006, Dr. K conducted the agreed-upon IEE.² (P 12; P14; 57) While Dr. K's written report is undated, it states that its results were scheduled to be reviewed with Student's mother on November 7, 2006. (P12, p.30) Dr. K observed that Student was a "compensated dyslexic" with a disability in phonemic pseudoword decoding. Dr. K concluded that, while Student had made measurable academic progress in reading comprehension, he still exhibited deficits in reading, math and spelling. Thus, she recommended targeted intervention in decoding skills. (N.T. 59, 64; P12)
 6. On February 28, 2007, the Speech and Hearing Center of the [redacted] Hospital in Harrisburg conducted audiological and central auditory evaluations of Student. (P13) Audiologically, Student was found to have no impairment for the reception of speech. (P13, p.3) He did, however, appear to have an auditory processing deficit that might contribute to poor organizational, planning, note-taking, and expressive language skills. (P13, p.3)
 7. On June 29, 2007, Student's parent requested the current due process hearing seeking additional compensatory education services. On September 5, 2007, I conducted a due process hearing, during which I admitted Exhibits P1-P14 into the record over the School District's objection. (N.T. 25-26, 72) Exhibits HO1-HO 2, and Exhibits SD1-SD3 were admitted without objection. (N.T. 73)
 8. At the September 5, 2007 due process hearing, the School District objected to going to hearing at all, arguing that this case has already been litigated and emphasizing that the School District had lost in the previous case. (N.T. 74-75) Student's Parent, however, argued that the current due process hearing was necessary because the earlier due process hearing and appeal considered only

² Dr. K's evaluation report purports to be a 36 page report. Student's exhibit P12, however, has only 30 pages, and appears to be missing pages 30-35.

Student's written expression and organization skills, but not any issues concerning Student's reading and/or speech/language deficits. (N.T. 12-13, 78, 80)

DISCUSSION

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all Students who qualify for special education services. 20 U.S.C. § 1412 The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education IEP is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, ___ U.S. ___, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) The U.S. Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast, *supra*. Of course, where one party has produced more persuasive evidence than the other party, the evidence is not in equipoise, and the Schaffer holding has no practical impact.

Children are not static beings; neither their academic progress nor their disabilities wait for the resolution of legal conflicts. Susan N. v. Wilson School District, 70 F.3d 751 (3d Cir. 1995) Even on appeal, however, appellate reviewers have the authority to accept additional evidence into the record, and they have the authority to exclude after-acquired evidence that was potentially available to a plaintiff when an IEP was created. William D v Manheim Township School District, 44 IDELR 127, 105 LRP 47088 (E.D. Pa 9/27/2005), citing Susan N., 70 F.3d at 762

The doctrine of res judicata prevents a litigant from getting yet another day in court after a lawsuit is concluded by offering a different reason for recovery of damages for the same invasion of rights. Thomas v. Brown, 969 F. Supp. 959 (E.D. Pa. 1997); Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A. 2d 309 (1995); In Re the Philadelphia School District, Special Education Opinion No. 1209 (2002) Generally, this prohibits seeking in later proceedings what was, or could have been, raised or appealed in a prior matter between the parties. In Re the Whitehall-Copley School District, Special Education Appeals Panel No. 1262, 37 IDELR 139, 102 LRP 17482 (2002)

It is clear that the legal doctrine of res judicata is available to hearing officers to serve the needs of efficient and equitable administrative law. In Re the Souderton Area School District, Special Education Appeals Panel No. 1291 (2002) Where preceding decisions identified the deficiencies in the IEP and the parents received the services and

compensation they sought, the doctrine of res judicata prevented the subject IEP from being re-litigated. In re the Wilson School District, Special Education Appeals Panel No. 1601 (2005); In re the Donegal School District, Special Education Appeals Panel No. 1718 (2006)

The elements to be considered in assessing whether res judicata applies in a particular case are: 1) identity of claims and issues; 2) identity of the parties; and 3) a prior decision on the merits. See Dempsey v. Cessna Aircraft Company, 439 Pa. Super. 172 (1995); In re the Brownsville Area School District, Special Education Opinion No. 955 (1999); In Re the Souderton Area School District., Special Education Opinion No. 1291 (2002); In Re the Great Valley School District., Special Education Opinion No. 1579 (2005); In Re the Sto Rox School District, Special Education Opinion No. 1605 (2005)

The second and third elements of the res judicata doctrine described above are met in this case. Just as now, the parties before Hearing Officer Valentini and the Appeals Panel were the School District and Student, and both decisions were “on the merits” decisions.

The question, then, is whether or not the first element of the res judicata doctrine applies, i.e., whether or not the claims and issues raised in the previous hearing and appeal are different from those raised today. In this case, as in the previous case, Student alleges that he was denied FAPE for the 2004-2005 and 2005-2006 school years. It would appear, then, that the claims and issues raised in the previous case are identical to those raised today.

Student’s parent contends that the claims and issues are not identical, however, because the previous hearing officer and appeal decisions were limited to Student’s written expression and organizational skills, and failed to consider issues relating to his reading and speech/language deficits, as well as to procedural issues such as a missing Notice of Recommended Educational Placement (NOREP.) (N.T. 12, 74, 78, 80) I reject Student’s argument.

First, it is clear that the previous due process hearing and appeal did, indeed, consider Student’s claims and issues concerning his reading deficits. Hearing Officer Valentini concluded that Student no longer required reading instruction. (SD 2, p.14) The Appeals Panel explicitly noted Student’s appeal of that conclusion, and the Appeals Panel addressed and rejected Student’s arguments regarding that issue. (SD 3, p.4, 7)

Now, Student’s parent raises the same argument again, but this time she uses Dr. K’s IEE conclusions as further proof that both Hearing Officer Valentini’s, and the Appeals Panel’s, conclusions were wrong. (P12) Clearly, Student’s Parent believes that both the previous hearing officer and the Appeals Panel were wrong in the conclusions that they reached – and perhaps they were. The recourse, however, for litigants who disagree with the previous conclusions of a hearing officer and/or the Appeals Panel is further, timely appeal, not a new due process hearing on exactly the same issue.

Hearing Officer Valentini and the Appeals Panel looked at all aspects of Student's claims and issues regarding the School District's provision – or denial – of FAPE for the 2004-2005 and 2005-2006 school years. They reviewed past documentary and testimonial evidence, including evaluation reports, IEPs, and evidence concerning the actual implementation of the IEPs. (SD 2; SD3) Based upon their review of all of that evidence, they agreed that the School District had denied FAPE to Student, and they were in agreement regarding the size and nature of the Hearing Officer's compensatory education award. (SD 2; SD 3) The third element of the res judicata doctrine, i.e., an identity of claims and issues, is met in this case. Despite arguments to the contrary by Student's parent, she is simply raising in the current due process hearing the same issues and claims raised in the previous due process hearing and appeal. Accordingly, res judicata does apply to bar Student's claims in this case.

In addition, implicit in the doctrine of res judicata is the concept of waiver which, like res judicata, is intended to achieve finality and to avoid piecemeal litigation. Simply speaking, Student's parent is not entitled to a new due process hearing every time she conceives another reason why Student might have been denied FAPE during the 2004-2005 and 2005-2006 school years. It is possible that Dr. K's IEE (P12) and/or the Polyclinic audiological and auditory processing report (P13) triggered in the mind of Student's parent another reason or two as to why Student was denied FAPE during the years in question, but that is not sufficient reason for relitigating the basic issue of FAPE denial for those school years. Student's failure to have raised particular procedural NOREP and speech/language concerns in the earlier due process hearing and appeal waives his right to raise them now.

Finally, I note that the doctrine of res judicata applies to both parties. In other words, my conclusions would be similar if, for example, Dr. K's IEE had indicated that Student had no disability during those years, and if the School District then filed for due process attempting to relitigate its liability for compensatory education for the 2004-2005 and 2005-2006 school years. Student's parent would have a strong argument that the doctrine of res judicata prevents the School District from obtaining another due process hearing on the same issue.

CONCLUSION

Student has already been awarded compensatory education as a remedy for the School District's failure to ensure FAPE for the 2004-2005 and 2005-2006 school years. He is not entitled to another due process hearing for the purpose of obtaining additional compensatory education for the same time period. Despite arguments to the contrary, there is an identity of claims and issues between the current due process request and Student's last due process hearing and appeal. Accordingly, I dismiss this case on the basis of res judicata.

ORDER

No action is required of the School District.

This matter is res judicata.

This case is DISMISSED and considered CLOSED.

Daniel J. Myers

Hearing Officer

September 24, 2007

ODR File No.: 7852/06-07 AS
Student: Student
School District: Harrisburg