PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

ODR File No.: 8154/07-08 AS
Student: VP
School District: Haverford Township
Type of Hearing: Open

For the Student:

Parents

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Due Process Hearing Request Date: October 1, 2007
Hearing Dates: November 16, 21, 27, 30, December 5, 17, 2007
Date Record Closed: January 4, 2008
Decision Date: January 14, 2008
Hearing Officer: Daniel J. Myers

BACKGROUND

Student is a xx year old 4th grade child with autism who contends that she has been denied FAPE while attending an approved private school for the last four years. She also contends that the School District's proposed program and placement in an intensive learning support classroom at one of its public schools is not the least restrictive environment appropriate. For the reasons described below, I find that Student has been denied FAPE for nearly three of her four years at the APS, and I agree that the School District's proposed program and placement does not meet its LRE requirements.

ISSUES

Whether the School District has provided a free and appropriate public education to Student in the past?

Whether the School District's proposed program and placement is appropriate?

FINDINGS OF FACT

1. Student is a xx year old, 4th grade, child with autism whose date of birth is xx/xx/xx. (SD 55, p.1; N.T. 182)[1] She demonstrates low average to average cognitive ability on a nonverbal test of intelligence; her math and reading skills are below test limits, estimated to be at a beginning kindergarten level at best. (P1, pp.9, 12-13; SD55, p.2) Student has very limited communication skills, falling below the first percentile in both receptive and expressive skills; she engages in verbal self-stimulation (echolalia and self-talk), but she articulates well

[1] References to "P," "SD," and "HO" are to the exhibits of the Parents, School District and Hearing Officer, respectively. References to "N.T." are to the transcripts of the November 16, 21, 27, 30, December 5, and 17, 2007 hearing sessions.

in verbal speech with prompting. (P1, p.13; P53; SD50, p.1; SD55, p.13, 20; SD57)

2. In September 2003, when Student entered the School District's school-age educational system, she rarely used independent verbal language, communicating her needs and desires through single words, rote phrases, gestures and body language. She followed basic classroom routine 75% of the time. (P12, p.3; N.T. 619) Due to her distractibility and lack of communication skills, her cognitive ability was difficult to assess. (P12, p.4) She required constant supervision for safety. (SD8, p.8) Her IEP team placed her at the [redacted] School (hereinafter, APS), which is an approved private school that provides special education services, primarily to children with autism, through the TEACCH, Applied Behavioral Analysis (ABA), and Picture Exchange Communication System (PECS) systems. (P 12; N.T. 616-617)
3. APS's IEPs over the last four years do not report present educational levels, goals, and progress monitoring in a format that allows easy comparison of goals and achievement. Many goals appear to be repetitive without indication of either progress or a change in instruction. (N.T. 364-369, 450, 453, 469, 748)
    a. In the social skills goal of taking turns with a peer, Student's June 2003 IEP sought to attain 80% achievement. (P12, p.7) Although she had reached this 80% goal by November 2004 (P14, p.3), it remained in her IEPs unchanged for the next two school years. (P14, p.11; P15, pp. 4, 15; P16, pp. 3, 11) In August 2006, the goal simply was increased to 100% expected achievement. (P17, pp. 4, 14)

b. In functional academics and readiness skills, she appears to have gradually improved in letter identification from a baseline of "inconsistent" in February 2004 (P13, p.2) to 80% identification of upper case letters in November 2004. (P14, p.2) Inexplicably, however, this skill then decreased to 60% achievement in October 2005 (P15, p.4) and remained at that level in August 2006 (P17, p.4), rising to 71% in October 2006. (P18, p4) Although she consistently has had an IEP goal since November 2004 to create sets of objects (1-10) with 80% accuracy, her baseline was never reported and her progress on this goal was not reported until her October 2006 IEP. (P 14, p.2; P15, p.4; P16, p.3; P17, p.4; P19, p.4)

c. In task-related skills, two of her November 2004 goals were to follow a full-day picture with word schedule 80% of the time, and to follow 2-step directions within 2 verbal prompts 80% of the time. (P14, p.12) For the next two years, her IEP present education levels reported the exact same "progress" on both goals, verbatim. (P15, p.4; P16, p.3; P17, p.4) The IEP language finally changed slightly in October 2006, reporting 100% achievement on the picture schedule goal, and a decrease in progress from 60% to 57% in the 2-step directions goal. (P18, p.4)

4. On September 26, 2005, Student's parent told the School District that she was considering placing Student at a typical, or regular education, school with an autistic support class because Student's interest in typical peers had started decreasing since entering APS. (SD14, p.3; N.T. 192, 643-644)

5. At an August 4, 2006, IEP team meeting, Student's parents recommended, among other things, a program and placement at Student's neighborhood public school, Elementary School A. (N.T. 198, 200) The rest of the IEP team rejected this recommendation because there was no autistic support class at Elementary School A. (N.T. 204; P34; P35; SD24; SD25; SD26; SD27) The Principal of Elementary School A, who was a member of Student's IEP team, believes that Student's attention and academic deficits, sensory needs, lack of communication and social skills, and need for one-on-one assistance would have caused her to appear different to her peers and would have resulted in her being more isolated from her peers rather than included with them. (N.T. 972-974)
6. Student remained at APS for the 2006-2007 school year. During that school year, Student began attending a typical Girl Scout troop, accompanied by her therapeutic support staff, that met after school hours at Elementary School A. (N.T. 219-220, 241, 885-888)
7. Between January and June 2007, the School District and Student's parents parried back and forth School District requests for parental permission to evaluate Student, a parental request for an independent educational evaluation at public expense, a School District due process hearing request to contest the IEE request, and eventual agreement to permit a School District evaluation of Student. (SD38; SD42; SD44; SD45; SD46; SD49; P26; N.T. 53-178, 603-767, 856-987, 1069-1152)

8. In September 2007, Student's parents did not return Student to APS, preferring instead to keep her at home until they were satisfied with Student's program and placement. (SD53; SD54)
9. On October 1, 2007, Student's attorney requested a due process hearing. (P48)
10. On October 17, 2007, Student's IEP team developed an educational program to be delivered in the intensive learning support (ILS) class at Elementary School B. (SD63; SD65; SD66; N.T. 889-890) Student's parents reject that proposed program and placement, preferring that Student's IEP goals be provided in a general education classroom in her neighborhood school (Elementary School A) with appropriate supports and services. (N.T. 905-907, 910-912, 918, 920)
11. Both Elementary Schools A and B have resource rooms. The difference between them is that the ILS resource room in Elementary School B is smaller (8 students compared to 16), with a special education teacher who is experienced in dealing with autistic students, and three instructional assistants. (N.T. 944-945, 978, 986; SD81) ILS Students also receive substantially more one-on-one support than Elementary School A's resource room students. (N.T. 991-992) ILS students receive vocabulary pre-teaching, direct social skills instruction, and computer access, are in the ILS classroom approximately ½ of the school day, for language arts and math instruction, and are accompanied by the ILS teacher and aides when attending general education classes. (N.T. 988-1152) Elementary School A's three 4th grade classrooms have 29, 28 and 28 students, respectively. (N.T. 980)
12. At the due process hearing, Parent exhibits P1, P1a, P2-P54, and P56-P64 were admitted into the record. (N.T. 1184) Admission of P2, P6, P7, P26, P34, P55,

P62, P63 was over School District objection. (N.T. 1167-1171) P55 was not admitted as irrelevant. (N.T. 1179-1180) School District exhibits SD1-SD72 and SD77-SD81 were admitted into the record. (N.T. 1189) Parent objections to SD73-SD76 were sustained. (N.T. 1189)

13. Also at the due process hearing, Student presented Dr. E, an expert in the inclusion of special education students into the general education setting, who has 32 years professional experience, is a tenured professor at [redacted] University, teaches graduate level courses, and consults with school districts regarding inclusion of autistic children. (N.T. 407-409, 412-413, 417-418, 425-420, 440, 443) She testified that she has seen even urban 4th grade classrooms with 37 students include autistic children such as Student. (N.T. 538-539) Such inclusion requires IEP teams to be very systematic about matching the child's goals to the general curriculum, to be flexible in using co-teachers, parallel instruction, small groups in stations, and books on tape during general language class with direct reading instruction from a reading specialist later. (N.T. 483, 494, 538-539) It also requires a real understanding of Student's needs, including curriculum-based assessments in math and reading. (N.T. 502, 504) Dr. E also testified that she has seen some school districts implement their LRE requirements in cookie-cutter fashion, offering inclusion only in specials and social studies/science classes because those classes tend to be shorter, less frequent classes, and because there are not PSSA goals attached to them. (N.T. 548)
14. Student also presented the testimony of Dr. B, who performed a private psychoeducational evaluation in May 2007. (P1) Dr. B is a retired school

psychologist with 34 years professional experience. (N.T. 53-58) She observed Student at home, at APS, at community-based summer programs, and during direct testing. (N.T. 60-61) She recommended intensive remediation and basic academic instruction in a highly structured, individualized setting at a public school, with part of the day in a special education setting and part of the day in a general education class. (P1, p.14; SD55, p.46, 47) She also recommended a personal care assistant, a school environment that fosters prosocial behavior, guided peer interactions, intensive speech and language therapy, a structured phonemically based reading program, occupational therapy, and a behavior plan. (P1, pp.14-15) She believes that Student was denied FAPE while at APS and that Student is entitled to at least four years of remedial compensatory education. (N.T. 118; Parent Written Closing Argument at 11)

15. The School District presented the testimony of special education professionals with experience in educating autistic children, including APS's assistant director, a certified school psychologist who works with 40-55 autistic children each year, the ILS teacher, and the principal of Elementary School A. All School District witnesses uniformly agreed that Student would receive meaningful educational benefit from the ILS, and that she would not benefit from greater inclusion in the School District's 4th grade classrooms. (N.T. 793) None of the School District witnesses testified, however, that the School District considered any additional supplementary aids, services, or efforts – other than those already existing – that might have increased Student's inclusion in a regular education 4th grade classroom.

CONCLUSIONS OF LAW

16. On September 26, 2005, Student's parents knew, or should have known, about the alleged action that forms the basis of the complaint in this case.
17. The maximum period of alleged FAPE denial that may be claimed in this case is from October 1, 2003 to the present.
18. The School District has denied Student FAPE since her November 2004 IEP.
19. The School District's October 2007 proposed educational program and placement does not meet its LRE obligation.

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)

Burden of Proof

The United States Supreme Court has held that, in an administrative hearing challenging a special education IEP, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 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) If the evidence produced by the parties is

completely balanced, or in equipoise, then the non-moving party prevails and the party with the burden of persuasion (i.e., the party seeking relief) must lose. Schaffer v. Weast, supra. If the evidence is not in equipoise, but rather one party's evidence is preponderant, or of greater weight or more convincing than the other party's evidence, then that party prevails whose evidence tips the scales.

The Shaffer decision did not address who bears the burden of persuasion when both parties seek relief from the hearing officer, e.g., when both parties seek to change the pendent IEP. Of course, as I just noted above, where any party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the evidence is not in equipoise, and the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence.

Statute of Limitations

Student contends that she made no meaningful educational progress while attending APS, thereby claiming that the School District has denied FAPE for the period from September 2003 (when she entered APS) to the present. The School District argues that the statute of limitations bars Student's claim from going back so far.

While Congress clearly intended to limit claims under the IDEIA and to require parents to file timely claims, In Re P. P. and the West Chester Area School District, Special Education Opinion No. 1757 (2006), Congress was not very clear in articulating the limits and time lines that it had in mind. Section 615(f)(3)(C) of the IDEA, 20 USCA §1415(f)(3)(C), requires parents to request a due process hearing within 2 years of the date they knew, or should have known, about the alleged action that forms the basis of the complaint. Section 615(b)(6)(B) of the IDEA, 20 USCA §1415(b)(6)(B), permits

parents to present complaints that set forth an alleged violation that occurred not more than 2 years before the date the parent knew or should have known about the alleged action that forms the basis of the complaint. The only two limited exceptions to these claims limitations are when the parent was prevented from making the request due to the local education agency's specific misrepresentations or withholding of information. 20 USCA §1415(f)(3)(D)

I simplistically refer to these claims limitations and timeline provisions as the "what" (615(b)(6)(B)) and "when" (615(f)(3)(C)) provisions, respectively, both of which hinge upon the "magic date" when the complainant knew, or should have known, about the alleged action that forms the basis of the complaint. Thus, in cases such as this, where the two limited exceptions described above (misrepresentations and information withholding) do not apply, my role is first to ascertain the magic date, and then determine whether the claim alleges violations that occurred not more than 2 years prior to the magic date (the "what"), and whether the complaint was filed within 2 years after the magic date (the "when").

I find that the magic date in this case is September 26, 2005, when Student's parent told the School District that she was considering placing Student at a typical, or regular education, school with an autistic support class because Student's interest in typical peers had started decreasing since entering APS. (SD14, p.3; N.T. 192, 643-644) On that date, Student's parents knew, or should have known, about the alleged action that forms the basis of this complaint. [2]

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[2] Although Student's parents argue that there is no evidence that they knew they had compensatory education claims until at least Spring 2007, when they first met with counsel and the issue of compensatory education was first discussed (P brief at 13), the

From that magic date of September 26, 2005, Student's parents had 2 years, or until September 26, 2007, within which to file a timely complaint (when), and their timely complaint could go back 2 years prior to the magic date, or to September 26, 2003 (what). If they had filed their due process hearing request on September 26, 2007, then their complaint would have alleged up to four years of FAPE denial, i.e., from September 26, 2003 through the date of filing on September 26, 2007.

For each day after the "magic date" of September 26, 2005, the "what" and "when" provisions of the IDEIA shift by one day. Thus, one day after the magic date, on September 27, 2005, Student's parents still could file a complaint going back 2 years, but only back to September 27, 2003 (what), and they still had 2 years, but up until September 27, 2007, within which to file that complaint (when). Similarly, on September 28, 2005, they had until September 28, 2007, to file their complaint going back to September 28, 2003; and etc., and etc.

In this case, Student's parents filed their due process hearing complaint on October 1, 2007. (P48) This obviously was their October 1, 2005 FAPE denial complaint, which IDEIA allows to go back to October 1, 2003 (the "what"), and which IDEIA permits parents to sit on until October 1, 2007 (the "when"). Accordingly, having found that Student's parents knew, or should have known, on September 26, 2005, about the alleged actions upon which their complaint is based, I conclude that the IDEIA statute of limitations operates in this case to limit Student's October 1, 2005 FAPE denial claim (filed on October 1, 2007) to the period from October 1, 2003 to the present.

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applicable IDEIA provisions do not hinge claims upon the date that parents knew of their legal claims, but rather upon the date that they knew about the alleged action that formed the basis of the complaint.

Student has been denied FAPE since her November 2004 IEP

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412 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, and the educational benefit must be more than a trivial or de minimis educational benefit. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988)

An IEP must include present levels of educational performance, measurable annual goals, appropriate objective criteria by which it may be determined on at least an annual basis whether the student is making progress and goals are being achieved, and the specially designed instruction which will be provided. 20 U.S.C. § 1414(d); 34 C.F.R. §300.347 First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.346

Not surprisingly, the parties differ regarding whether or not Student made meaningful educational progress while at APS. The School District contends that Student made slow but meaningful educational progress, "from being essentially non-verbal to being a child whose primary means of communication is verbal." (School District's Written Closing Argument at 1) Student contends that when she entered APS "she already had some readiness skills…[and] never moved beyond the pre-kindergarten to kindergarten level." (Parent's Written Closing Argument at 2)

I conclude that, while Student clearly learned some things during her four years at APS, she was denied FAPE because her IEPs, beginning with November 2004, lacked the systematic present levels of educational performance, measurable annual goals, and appropriate progress monitoring that were necessary to constitute FAPE. 20 U.S.C. § 1414(d); 34 C.F.R. §300.347 Many IEP goals were repetitive without indication of either progress or a change in instruction. (N.T. 364-369, 450, 453, 469, 748) Although Student had achieved her 80% turn-taking social skills goal by November 2004 (P12, p.7; P14, p.3), it remained unchanged in her IEPs for the next two school years. (P14, p.11; P15, pp. 4, 15; P16, pp. 3, 11) Although Student appears to have gradually improved in letter identification from a baseline[3] of "inconsistent" in February 2004 (P13, p.2) to 80% identification of upper case letters in November 2004 (P14, p.2), she then inexplicably dropped to 60% achievement in October 2005 (P15, p.4) and remained at that level in August 2006 (P17, p.4), rising only to 71% in October 2006. (P18, p4) Although since November 2004 Student's IEPs have always included a goal to create sets of objects (1-10) with 80% accuracy, her baseline was never recorded and her progress on this goal was never reported until the October 2006 IEP. (P 14, p.2; P15, p.4; P16, p.3; P17, p.4; P19, p.4) In task-related skills, two of her November 2004 goals were to follow a full-day picture with word schedule 80% of the time, and to follow 2-step directions within 2 verbal prompts 80% of the time. (P14, p.12) For the next two years, her IEP present education levels reported the exact same "progress" on both goals, verbatim. (P15, p.4; P16, p.3; P17, p.4) The IEP language finally changed slightly in October 2006, reporting

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[3] Of course, "inconsistent" is not an appropriate baseline to begin with because it is not measurable and is impossible to compare to future progress with any precision and confidence.

100% achievement on the picture schedule goal, and a decrease in progress from 60% to 57% in the 2-step directions goal. (P18, p.4)

Such inconsistencies and lapses in data recording do not meet the standards for FAPE and are surprising, considering that APS is an approved private school that provides special education services primarily to children with autism. (N.T. 616-617); 20 U.S.C. § 1414(d); 34 C.F.R. §300.347; Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Accordingly, I find that Student was denied FAPE at APS since her November 2004 IEP.

Least Restrictive Environment (LRE)

School Districts are required, to the maximum extent appropriate, to educate children with disabilities with children who are nondisabled. 34 CFR §300.114(a) Carlisle Area School District v. Scott P., 62 F.3d 520, 535 (3d Cir.1995) A school district's obligation to make reasonable efforts to accommodate a disabled child in a regular education classroom is substantial. Girty v. School District of Valley Grove, 163 F.Supp.2d 527 (W.D. Pa. 2001)

The first part of the two-part Oberti LRE test is to determine whether education in the regular classroom can be achieved satisfactorily with the use of supplementary aids and services. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1995) This determination includes several factors, including: 1) whether the school district has made reasonable efforts to accommodate the student in a regular classroom; 2) the educational benefits available to the student in a regular education classroom with supplementary aids and services, as compared to the benefits of a segregated special education classroom;

and 3) the possible negative effect of the student's inclusion on the other children's educations. It not necessary to move to the second part of Oberti's two-part test unless the first part demonstrates that placement outside the regular classroom is required. Id.

The School District has not met its LRE obligation

The School District argues that Student would receive meaningful educational benefit from its proposed ILS program and placement, and that this proposed program bears a remarkable similarity to the program recommended by one of Student's witnesses, Dr. B. (SD brief at 13) School District witnesses all agreed that Student would not benefit from greater inclusion in the 4th grade classrooms with the extant services offered by the School District. (N.T. 793) These arguments, however, put the cart before the horse.

School districts must include disabled students in regular education classrooms even if the curriculum must be modified to permit such placement. 34 C.F.R. §300.116(e) If the School District has given no serious consideration to including the child in less restrictive classes with supplementary aids and services, and to modifying the curriculum to accommodate the child, then it has most likely violated the IDEA's mainstreaming, or LRE, directive. The relevant focus is whether Student can progress on her IEP goals in a regular education classroom with supplementary aids and services, not whether she can progress at a level near to that of her non-disabled peers. Even if the child receives less academic benefit in an inclusive setting, such setting may be warranted if the benefit of social modeling, language development and social skills development outweighs the potential academic benefit of a segregated setting. Girty v. School District

of Valley Grove, 163 F.Supp.2d 257 (W.D. Pa. 2001) Thus, the gap between a student's abilities and the demands of the general curriculum is not determinative.

None of the School District witnesses testified that the School District considered any supplementary aids, services, or efforts – other than those already existing – that it might have offered at either Elementary Schools A or B to increase Student's inclusion in a regular education 4th grade classroom. This appears strikingly similar to Dr. E's observation that some school districts implement their LRE requirements in cookie-cutter fashion, offering inclusion only in specials and social studies/science classes because those classes tend to be shorter, less frequent classes, and because there are not PSSA goals attached to them. (N.T. 548)

In this case, I find that the School District has failed the first criterion of the first part of the Oberti test by failing to accord serious consideration to including Student in regular classes with supplementary aids and services. Although the ILS classroom appears to be a very excellent, high quality resource from which Student would benefit, [4] the School District jumped the Oberti gun in this case. It simply looked at its existing program boxes and determined which one it could plug Student into, without seriously considering whether there are any other, out-of-the-box ways in which Student could have been more included into a general education 4th grade classroom. [5] The record indicates, through Dr. E's testimony, that the School District could have conducted (but

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[4] In fact, after seriously considering and monitoring less restrictive environments, the IEP team may eventually conclude that the ILS is the most appropriate LRE for Student.

[5] The School District's exaggerations of its regular education classrooms, even likening them to Grand Central Station (N.T. 679) illustrates its reluctance to seriously think outside the box when considering Student's LRE possibilities.

didn't) curriculum-based assessments in math and reading to get a real understanding of Student's needs, systematically matched Student's IEP goals to the general curriculum, and been more flexible in considering the use of co-teachers, parallel instruction, small groups in stations, and books on tape during general language class with direct reading instruction from a reading specialist later. (N.T. 483, 494, 502, 504, 538-539) I also note that inclusion experts are available for school districts that need assistance in listing a full continuum of supports and services for their students. See C.M. and the Central Bucks School District, Special Education Opinion No. 1430 (2003); G.A.B. and the Hempfield Area School District, Special Education Opinion No. 1467 (2004)

By limiting its LRE considerations only to those programs and placements already in existence, the School District did not satisfy its Oberti obligation to give serious consideration to including Student in less restrictive classes with supplementary aids and services, and to modifying the curriculum to accommodate Student. Thus, I conclude that the School District's October 2007 proposed educational program and placement does not meet its LRE obligation.

I will not order that Student be placed at Elementary School A

Student's parents maintain that Student should be placed at her neighborhood school, Elementary School A, in a regular education language arts and math classroom with occasional pullouts. (Parent Written Closing Argument at 20) Student notes that, unless the IEP requires some other arrangement, a child with a disability is to be educated in the school that she would attend if nondisabled. 34 C.F.R. § 300.16(c) I reject this argument, however, for two reasons. First, there is a consistent and long line of cases establishing that there is no per se right to a neighborhood school placement. In Re A.G.

and the Wissahickon School District, Special Education Opinion No. 1455 (2004) Second, the School District will be required in this case to reconvene the IEP team to consider any additional supplementary aids and services that it might employ, in addition to the extant programs it already has, to increase Student's inclusion in the regular education classroom. It would be premature at this time for me to determine, before the IEP team has met, that placement must occur at Elementary School A.

I will not issue any Declaratory Judgment

The School District contends that Student seeks a declaratory judgment regarding the appropriateness of the School District's 2005 reevaluation. (School District Written Closing Argument at 13) While this did come up at some point during the hearing, it is not clear from Student's post-hearing brief whether or not she actually seeks such relief.

In any event, where an issue is considered moot, a judicial decision is considered to be an inappropriate "advisory opinion." Hearing officers are not empowered to issue advisory opinions. In Re the Educational Assignment of a Student in the Colonial School District, Special Education Opinion No. 1008 (2000) An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. Preiser v. Newkirk, 422 U.S. 395, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1978)

My determination of the appropriateness of the School District's 2005 reevaluation is not necessary to resolve the dispute in this matter because I have already determined that Student was denied FAPE both before and after the 2005 reevaluation. Thus, any dispute regarding the 2005 reevaluation is moot. Accordingly, to the extent that Student seeks declaratory judgment regarding the appropriateness of the 2005 reevaluation, that request is denied.

Remedies

Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. M.C. v Central Regional School District, 81 F.3d 389 (3rd Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 488 U.S. 923 (1991) The period of compensatory education has been calculated in two different ways by the Courts. For many years it was calculated to be equal to the period of deprivation, less a reasonable rectification period. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999) Since 2006, hearing officers can also focus on what it will take to bring the student to the point she should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Comwlth. 2006)

The B.C. standard may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because she has progressed appropriately despite having been denied a FAPE. In some cases, however, the B.C. standard is "unworkable" because the record does not contain evidence of where a Student would have been had she received FAPE. In Re J.L. and the Ambridge School District, Special Education Opinion No. 1763 (2006)

In the present case, the level of achievement that Student would have attained had she received appropriate instruction is not addressed in testimony or exhibits. Thus, I lack any evidentiary basis for determining the amount of compensatory education required to bring Student to the position she would have attained had the School District provided FAPE. As in J.L., supra, I find the B.C. standard in this case to be unworkable.

Dr. B did testify that she believes Student is entitled to at least four years of remedial compensatory education. (N.T. 118; Parent Written Closing Argument at 11) Her opinion appears to be based upon a one-for-one standard, considering Student's four years of attendance at APS. Using that same one-for-one standard, I conclude that Student is entitled to 450 days, or two and one half school years, of compensatory education. This is based upon my finding that the School District denied Student FAPE beginning with her November 2004 IEP.

A reasonable period for rectification would have been through to the end of that first semester of the 2004-2005 school year. The School District is liable for compensatory education, therefore, for the second semester of 2004-2005, and through the 2005-2006 and 2006-2007 school years. The School District's compensatory education liability ended at the end of the 2006-2007 school year for two reasons: 1) Student's parents unilaterally removed Student from school and kept her at home at the beginning of the 2007-2008 school year (SD53; SD54), thereby preventing the School District from providing any educational services to Student; and 2) pendency attached on October 1, 2007, thereby legally obligating the School District to continue the pendent placement (absent agreement from the Parent to do otherwise) until the conclusion of the hearing and any subsequent due process appeal. In Re B.T. and Derry Township School District, Special Education Opinion No. 1781 (2006) [6]

[6] I reject the School District's argument the equities favor it because Student's parents withheld parental permission to evaluate student, and no certified school psychologist will perform psychoeducational testing on a child without parental permission. (School District Written Closing Argument at 8) Rather than refuse to perform an evaluation and argue the equities, the appropriate School District reaction should have been to request a due process hearing to override parental refusal to permit an evaluation – which is what the School District eventually did. (SD43; SD46)

Regarding the School District's proposed program and placement, compensatory education is not an appropriate remedy for an LRE failure. The appropriate remedy is to order a change in placement to the less restrictive environment, not compensatory education. In Re B.T. and Derry Township School District, Special Education Opinion No. 1781 (2006); In Re A.G. and Wissahickon School District, Special Education Opinion No. 1455 (2004)

CONCLUSION

The IDEIA's statute of limitations limits Student's claim to October 1, 2003 forward. I find that, from November 2004 through the end of the 2006-2007 school year, the APS's IEPs were inappropriate and failed to provide FAPE to Student. After considering a reasonable rectification period, as well as Student's unilateral refusal to attend school in September 2007, I award 2 ½ years, or 450 days, of compensatory education for that FAPE denial. I also conclude that the School District has failed the first criterion of the first part of the Oberti test by failing to accord serious consideration to including Student in regular classes with supplementary aids and services. Thus, I will order the IEP team to reconvene for appropriate LRE consideration.

ORDER

- The School District denied Student FAPE from November 2004 through the end of the 2006-2007 school year; Student is entitled to 450 days of compensatory education services;
- The School District's proposed program and placement is inappropriate because it was not developed with the intention to accommodate Student in a regular education classroom with supplementary aids and services to the maximum extent appropriate;
- The School District shall reconvene the IEP team to develop an IEP with the intention to accommodate Student in a regular classroom with supplementary aids and services to the maximum extent appropriate. This IEP development shall include:
    - curriculum-based assessments in math and reading;
    - systematic matching of Student's IEP goals to the general curriculum;
    - consideration of the use of co-teachers, parallel instruction, small groups in stations, and books on tape during general language class with direct reading instruction from a reading specialist later;
    - consideration of the educational benefits available to the student in a regular education classroom with supplementary aids and services, as compared to the benefits of a segregated special education classroom;
    - consideration of the possible negative effect of the student's inclusion on the other children's educations;

- consideration of the use of outside inclusion experts for assistance in listing a full continuum of various supports and services that might be considered for Students; and
- a mechanism for monitoring and fine-tuning Student's inclusion experiences in another IEP meeting before the end of the current semester.

Daniel J. Myers

Hearing Officer

January 14, 2008

ODR File No.: 8154/07-08 AS
Student: Student
School District: Haverford Township