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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: EW

Date of Birth: xx/xx/xx

Dates of Hearing:
May 27, 2008
CLOSED HEARING
ODR #8521/07-08 KE

Parties to the Hearing:

Representative:

Pro Se

School District of Philadelphia
440 North Broad Street, Suite 313
Philadelphia, PA 19130-4015

Kenneth S. Cooper, Esquire
Office of General Counsel
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Date Record Closed:

May 29, 2008

Date of Decision:

June 8, 2008

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an elementary school age eligible resident of the School District of Philadelphia (District). (NT 17-18.) The Student is identified with Specific Learning Disability and Speech and Language Impairment. (NT 18-22.) Ms. (Parent) requested due process, alleging: 1) that the District failed to provide the Student with transportation to school, resulting in irregular attendance because of the Parent's time pressures and unreliable automobile; and 2) that the District failed to provide ESY services that would assist the Student to benefit from Student's education.

The District asserted that it had no obligation to provide transportation to the Student, because the Parent had chosen to place Student at a school that was not Student's neighborhood school and had waived transportation services in writing. The District also asserted that the Student did not need ESY services according to the criteria set forth in Pennsylvania regulations, 22Pa. Code §14.132.

The parent filed the Complaint for the Student on an ODR Request Form on February 13, 2008, along with a separate request form for Student's sibling. On March 10, 2008, the hearing officer found the Parent's Complaint to be insufficient. The Parent filed a letter amending the Complaint for the Student and for Student's sibling on or about March 21, 2008. The matter was scheduled for expedited hearing on ESY issues only, but the Parent asked that it be continued and waived the Parent's right to expedited hearing, so that all issues could be heard at one time for the Student and Student's sibling. The hearing was held and completed on May 27, 2008, for both the Student and Student's sibling, at the request of the Parent. The record closed on May 29, upon receipt of the transcript.

ISSUES

1. Is the Student entitled to transportation as a related service?
2. Is the Student entitled to ESY services as part of Student's special education program?

FINDINGS OF FACT

1. The Student was removed from the Parent's home early in Student's educational career, and then was returned to the Parent's home. When Student returned to Student's Parent's home, the Student was eligible for and

was enrolled in Student's neighborhood school, the [neighborhood] School. (NT 36-37, 55-57.)

2. The Parent understood that the [neighborhood] School was a poorly performing school, and obtained a transfer of the Student to the [out-of-neighborhood] School, which Parent understood to be a better performing school. (NT 36-37, 55-57.)
3. The Student is making continuous progress at [out-of-neighborhood] School. (NT 134, 137-141, 161, 169-170.)

TRANSPORTATION

4. The [out-of-neighborhood] School is not the Student's neighborhood school, and it is at greater distance from the Parent's home than the [neighborhood] School. (36-37, 55-57.)
5. As a condition of transfer to a non-neighborhood school, the District requires parents to sign a form that acknowledges that transportation services will not be provided. (NT 41, 125-126, 128-131; S-1.)
6. The Parent signed such a form, thus in effect waiving transportation services. The Parent knew that transportation would not be provided before sending the Student to [out-of-neighborhood] School. (NT 37, 59-66, 85-87, 125-128.)
7. The Parent finds it difficult to transport the Student to school, due to the needs of the Parent's other children, and the unreliable condition of Parent's automobile. The children cannot be sent to school by themselves for safety reasons, and also because of the pendency of family court supervision. As a result, the Student is sometimes late for school; sometimes Student is early for school, which creates child-care issues for the Parent and the school. (NT 45-49, 69-70, 93-94, 98-101, 105, 111, 119.)
8. The IEP team discussed transportation and determined that the Student did not need it to be present for school or to benefit from special education services at school. (NT 129-132.)
9. The Parent made it clear that Parent disagreed with the District's decision not to provide transportation, even though Parent signed NOREP forms indicating agreement with the IEP. (NT 73-78, 79-82, 115-116, 128; S-2, S-3.)
10. The Student receives special education in the form of both speech and language therapy for articulation, and part time learning support services in a resource room, at [out-of-neighborhood] School. The speech and language intervention is provided two to three times per week, and the resource room is provided one hour per day. (NT 43-45, 169; S-2.)

11. Resource room services are timed to be available only when the Student is in school; thus, lateness does not prevent the Student from receiving those services. Speech and language services are provided in the resource room context, so lateness does not interfere with receipt of speech and language services. (NT 168-169, 174-175.)

EXTENDED SCHOOL YEAR SERVICES

12. The IEP team determined that the Student did not need ESY services to benefit from special education services. (NT 132-135.)
13. The Student did not display problems with regression and recoupment during the 2007-2008 school year that interfered with Student's progress toward Student's IEP goals. (NT 134-135.)
14. The Student was not in jeopardy of losing an important skill or a skill related to self sufficiency, nor was Student withdrawing from the learning process. (NT 134-135, 136-141.)
15. The District determined that ESY programming would not help the Student advance as well as Student would in the regular education summer program, because that program would provide greater emphasis on academic skills. (154-155, 172-173.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The United States Supreme Court has decided who has the burden of proof in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court decided that the burden of proof is on the party asking a hearing officer to enter an order. In this case, that party is the Parent. However, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced more evidence than the other party. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly in favor of one party, that party will prevail.

FREE APPROPRIATE PUBLIC EDUCATION

Not every child with a disability is entitled to special education and related services from a school district. The IDEA defines a child with a disability as "a child ... who, by reason [of Student's disability], needs special education and related services."

20 U.S.C. §1401(3)(A)(emphasis supplied); accord, 34 C.F.R. §300.8(a)(1). Only a child who needs such services is considered eligible for them. 20 U.S.C. §1412(a)(1)(A). Thus, the need for services is the basis for identification of a child as a child with a disability. See generally, Mr. I v. Maine School Administrative District No. 55, 480 F.3d 1 (1st Cir. 2007).

When a child is identified with a disability, the District is obligated to provide a free and appropriate public education (“FAPE”), in accordance with an Individualized Education Plan (IEP) 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). Under the IDEA, a district must address “each of the child’s ... educational needs that result from the child’s disability” 34 C.F.R. § 200.320(a). See, M.C. v. Central Regional School District, 81 F. 3d 389, 393-394 (3rd Cir. 1996). These needs include behavioral, social and emotional skills. Ibid. Thus, a district’s obligation is to provide those services that address the child’s individual needs. Mr. I, supra.

The District’s obligation to provide FAPE includes transportation services in some cases, but not in all cases. FAPE is defined as “special education and related services” provided according to the IEP. 20 U.S.C. §1401(9); 34 C.F.R. §300.17. The term “related services” is further defined:

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education

34 C.F.R. §300.34(a). The Supreme Court has made it clear that districts are required to provide only those services that are necessary to enable the child to benefit from education. In Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1984), the Court stated that “only those services necessary to aid a handicapped child to benefit from special education must be provided” Thus, a child with a disability is entitled to transportation only if transportation is required to help that child benefit from Student’s special education as set forth in the IEP. The focus of the law is upon the needs of the child, not those of Student or Student’s parents, no matter how great or legitimate the parent’s needs may be.

TRANSPORTATION

The Parent brought this due process request because Parent had been told that the children were eligible for transportation because they were identified as children with disabilities. The hearing officer has studied the law, and concludes that the Parent misunderstands the law. The children are eligible only to have their transportation needs considered. They are not entitled to transportation unless it is necessary so that they can benefit from the educational services provided to them by the District. The above laws,

regulations and cases make this clear. Thus, the key factual issue is: does the Student need transportation services in order to benefit from special education services offered by the District?

The Parent also wanted to know whether the federal law – that is, the IDEA – applies if it conflicts with local district policies and state laws governing transportation. The hearing officer believes that the IDEA ordinarily would supersede local laws and policies if they are contrary to the IDEA; if there is a conflict, usually the requirements of the IDEA would have to be followed. Mr. I. v. Maine School Administrative District No. 55, 480 F.3d 1, 10-11 (1st Cir. 2007). Thus, even if the Parent gave up the right to transportation because Parent had the children transferred to a school that was not the neighborhood school, (FF 5, 6), they would be entitled to transportation if the IDEA required it. (FF 9.) However, the evidence in this matter shows that the IDEA does not require it, and the Student is not entitled to transportation.

The Parent honestly stated that Parent withdrew the children from [neighborhood school] because Parent believed that they would not be getting an appropriate education there. (FF 1, 2.) But there is no evidence that the Student failed to make educational progress there, nor is there any evidence that [neighborhood school] failed to provide the services required in the Student’s IEP. There is no evidence that the [out-of-neighborhood] School provided better or more effective special education services.

While there was evidence that the Parent considered the services at [neighborhood school] to be inadequate, the Parent is not qualified by education or experience to give an opinion to that effect. There was not a witness nor was there a document indicating that the school provided services so inadequate that it became necessary to transfer the Student to [out-of-neighborhood School]. There simply was not enough evidence to create a “preponderance” of evidence that this was necessary.¹

The hearing officer accepts the Parent’s statement that it is necessary to transport the children to [out-of-neighborhood School], and that this is difficult because of the needs of the other children and unreliable automobile. (FF 4, 7.) However, the evidence shows that this does not interfere substantially with the Student’s education. (FF 3, 8, 10, 11.) The District’s witnesses stated that the Student does not lose any special education services when Student is late, because the resource room service, during which at least some speech and language services are provided, does not start without the Student. (FF 11.) Moreover, the Parent was not able to point to evidence of excessive lateness, nor to show what services the Student would lose in Student’s educational program when

¹ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

Student should be absent. (FF 7.) The most telling testimony was by teachers who testified that the Student is making acceptable progress. (FF 3.) They also testified that the IEP team did consider transportation and decided that the Student does not require it in order to benefit from education. (FF 8.)

In sum, the record shows by a preponderance of evidence that the Student does not need transportation services to benefit from special education services. Transportation is needed only because the Student is attending a school outside of Student's neighborhood. (FF 4-7, 9.)

EXTENDED SCHOOL YEAR SERVICES

The Parent indicated that Parent brought this issue to due process primarily because Parent wanted to understand more about Extended School Year services (ESY), and felt that it was not adequately explained. (NT 54.) ESY services are special education and related services that are provided to a child with a disability beyond the regular school year, including during the summer. 34 C.F.R. §300.106. This most often is necessary because of the risk of regression during a summer away from school. Many students regress somewhat during the summer, but they are able to relearn their skills in the beginning of the new school year, a process called recoupment. (NT 160-161.) Some children with disabilities regress so much that they will not ever make progress unless regression is prevented through ESY services. (NT 160-161.) This is the purpose of ESY in many cases.

During the hearing, the Parent tried to make a case that the children were entitled to such services, based upon the argument that such services would help the children and would be accommodated to meet their needs better than the general education summer programming offered by the District. Although these considerations are no doubt important, the hearing officer cannot order ESY unless the Student meets the test that the law sets for eligibility.

The legal test requires proof that the Student needs ESY because Student would not benefit from education without it. 34 C.F.R. §300.106; 22 Pa. Code §14.132. Thus, it is not enough to argue that ESY services would benefit a child; they must be necessary to ensure educational benefit.

Pennsylvania regulations provide a list of factors that must be considered by IEP teams, who are required to consider and decide whether or not ESY services are appropriate for a child. 22 Pa. Code §14.132. The IEP team must consider the risk of regression and the likelihood and likely extent of recoupment. 22 Pa. Code §14.132(2)(i-iii). It must also consider whether that risk is enhanced due to the severity of the student's disability, 22 Pa. Code §14.132(2)(viii), and whether or not an important skill is at risk due to likely regression, such as a skill needed to enhance the student's self-sufficiency or independence. 22 Pa. Code §14.132(2)(iv-v). The team must also consider whether or not the Student is likely to withdraw from the learning process if not provided ESY services. 22 Pa. Code §14.132(2)(vi).

The record shows that the IEP team considered most or all of these factors. (FF 12-14.) The District's witnesses testified that the team considered the risk of regression, the likelihood of recoupment, and whether or not an important skill is at risk if no ESY is provided. (FF 13, 14.)

Nothing in the record suggests that the Student's disabilities are considered "severe" within the meaning of the term as used in the Pennsylvania regulations governing ESY services. The examples given in the regulation – mental retardation, autism, and severe multiple disabilities - are not at all similar to the kinds of disabilities that the Student displays. The Parent testified that the Student's disabilities are severe, but the hearing officer finds that this evidence is insufficient to provide a preponderance of evidence that the Student meets the legal standard of severity, because the Parent is not qualified to render an expert opinion on the severity of the Student's disabilities. Contrary to this opinion is the IEP team's decision that the Student does not need ESY services, (FF 12, 15), and this is preponderant evidence against the Parent's claim.

The evidence, by a preponderance, established that the Student was not withdrawing from the learning experience. The principal and Student's teachers characterized Student as making continuous progress. (FF 3.)

CONCLUSION

In conclusion, the law requires proof that the Student cannot benefit from Student's special education services unless provided with transportation and ESY services. The hearing officer finds that the evidence does not establish such a necessity for requiring either transportation or ESY services. Consequently, the hearing officer cannot issue the order that the Parent requests.

ORDER

1. The Student is not entitled to transportation as a related service.
2. The Student is not entitled to ESY services as part of Student's special education program.

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

June 9, 2008

