

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: KL

Date of Birth: xx/xx/xx

Dates of Hearing:
May 19, 2008
CLOSED HEARING
ODR #8569/07-08 KE

Parties to the Hearing:

Mr.

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

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Kenneth S. Cooper, Esquire
Office of General Counsel
440 North Broad Street, Suite 313
Philadelphia, PA 19130-4015

May 28, 2008

June 7, 2008

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an elementary school age eligible resident of the School District of Philadelphia (District). (S-2.) The Student is identified with Specific Learning Disability and Other Health Impairment. Ibid. Mr. (Parent) requested due process alleging that 1) the District failed to schedule a requested due process hearing; 2) the District delayed unreasonably in providing an evaluation; 3) the District allowed the Mother¹ to transfer the Student from the neighborhood school in the Parent's area of residence (the School in Father's neighborhood) to the neighborhood school in the Mother's area of residence (the School in Mother's neighborhood); 4) the District failed to allow the Parent to participate in the Student's educational planning contrary to a court order; 5) the District failed to report child abuse to appropriate authorities; and 6) the District failed to identify a [medical] condition as a disability and as a result, the Student was unable to benefit educationally. (NT 27-53.)

The District asserted that it had no obligation to file a due process request for the Parent, and that it was unaware of any request for due process in 2007. (NT 53-56.) It argued that it had no obligation to evaluate based upon an order of court, because the court in a custody proceeding had no jurisdiction of the District; moreover, it asserted that it did in fact issue a permission to evaluate within twenty days of the court order. (NT 56-57.) The District argued that it did not have any court order showing that the Mother was without authority to transfer the Student from the school in Father's neighborhood to the school in Mother's neighborhood. (NT 57-59.) Similarly, the District stated that it had no obligation to treat the Student's [medical] condition and that it properly implemented applicable truancy laws regarding alleged excessive absences. (NT 59-62.)

The parent requested due process by a series of emails to various employees and officials of the District in January 2008. A written request was filed in February 2008 on an ODR form used to initiate mediation, but the request was treated as a request for due process, and the hearing was scheduled for April 21, 2008. This session was continued to May 19, 2008 at Parent's request. The hearing was completed in one session and the parties were given leave to forward documents for admission into evidence; these were received on May 28, at which time the record was closed.

ISSUES²

¹ The designation of Mr. as the Parent is solely for convenience. It is not meant to disparage any legal or physical custodial rights that the Student's Mother may have, and no finding is implied regarding any such rights.

² The hearing officer ruled at the hearing that he had no jurisdiction over the District's compliance with laws or court orders regarding custody or truancy; thus he did not hear the issues concerning the transfer from the school in Father's neighborhood to the school

1. Did the District deprive the Student of a free appropriate public education by failing to forward a due process request to the Office for Dispute Resolution during the 2006-2007 or 2007-2008 school year?³
2. Did the District deprive the Student of a free appropriate public education by failing to re-evaluate the Student in a timely fashion?
3. Did the District offer an appropriate educational program and placement to the Student during the 2006-2007 or 2007-2008 school year?
4. Should the hearing officer award compensatory education for the 2006-2007 or 2007-2008 school year?

FINDINGS OF FACT

1. The District was on notice of an order of the Court of Common Pleas of the First Judicial District dated September 16, 2005, marked as temporary, in which joint legal custody was awarded to the Parent and the Student's Mother, and physical custody was to be shared among them and delegated to the Student's Grandmother by agreement of the Parent and the Mother. (NT 86-88, 105-107; P-4, P-7, P-9.)
2. By order dated November 9, 2006, the Court ordered the Parent and the Mother to facilitate a psycho-educational evaluation of the Student. (NT 100-P-9.)
3. On November 29, 2006, the Parent and Mother requested an evaluation in a meeting with school officials and presented the court order calling for an evaluation. The school officials agreed to perform an evaluation. (NT 106-107, 150-151; P-12.)
4. A permission to evaluate was signed on November 29, 2006. (NT 151.)
5. In February 2007, the District approved an independent psychological evaluation at the Parent's request. (P-12.)

in Mother's neighborhood, the allegation of excessive absences, or the allegation regarding the Parent's participation in educational planning prior to November 2007, when, as he asserted, the Parent obtained full custody. Similarly, the hearing officer ruled that he lacked jurisdiction over claims of failure to report child abuse. (NT 67-72.)

³ The Parent made it clear at the hearing that he did not question the appropriateness of the Student's education while at the school in Father's neighborhood; his only concern was with the services at the school in Mother's neighborhood. The Student transferred to the school in Father's neighborhood on December 5, 2007, (P-3 p. 12), so the only relevant period in the 2007-2008 school year is from the beginning of the school year until that date.

6. The District evaluated the Student, and in May 2007, it found Student ineligible. It never issued a NOREP. (NT 151; S-2 p. 2, S-3 p. 2.)
7. During the 2006-2007 school year, the Student suffered from a [medical] condition of unknown origin, that distracted Student from Student's schoolwork. (NT 99, 102-103, 111.)
8. The Student was living with the Mother until November 2007, when full physical custody was awarded to the Parent. Until then, the Parent had very limited contact with the Student. (NT 97-98, 114-115, 106, 138.)
9. The Grandmother requested due process in writing on or about February 27, 2007. (NT 79-86; P-7.)
10. The Grandmother requested due process again in January and February 2008 by repeated email messages. (P-5, P-6, P-8.)
11. The Student is behind Student's peers in educational achievement, in math, reading decoding and reading fluency. Student was at grade level in reading comprehension in January 2008. (NT 90-92; S-2 p. 3, 4, P-2 p. 7, P-11.)
12. The Student did not want to go to school at the school in Mother's neighborhood. (NT 95.)
13. During the 2006-2007 school year, the Student was transferred several times from one school to another. Student also experienced excessive absenteeism at times during that year. (NT 97-99, 117-119; P-3, P-11.)
14. In March 2008, the District offered a Service Agreement under section 504 of the Vocational Rehabilitation Act of 1973, which provided accommodations for the Student for needs associated with ADHD and Specific Learning Disability. (NT 152; P-15.)

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. West, 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.

CHILD FIND

The District has an affirmative duty under the IDEA to identify, locate and evaluate all children residing within its boundaries who are in need of special education and related services. 20 U.S.C. § 1412(a)(3). This obligation exists “regardless of the severity of [the child’s] disability”, 34 C.F.R. § 300.111(a)(1)(i), and extends to children “suspected” of being disabled and in need of special education, regardless of whether or not the child is advancing from grade to grade. 34 C.F.R. §300.111(c)(1). The District is obligated to find and evaluate disabled children within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability. W.B. v. Matula, 67 F.3d 484, 500-501 (3d Cir. 1995); O.F. ex rel. N.S. v. Chester Upland School District, 246 F.Supp. 409, 417-18 (E.D. Pa. 2002).

FREE APPROPRIATE PUBLIC EDUCATION

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.

Compensatory education is an appropriate remedy where a district has failed to provide a child with a disability with FAPE under the IDEA. 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). 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 (3rd Cir. 1999).

In the present matter, the hearing officer finds that the District did not identify the Student as a child with a disability until the reevaluation report of April 2008. There is not enough evidence that the District failed to evaluate soon enough or that its decision not to identify was inappropriate, and there is not enough evidence that the Student did not receive meaningful educational benefit. Therefore, the hearing officer cannot award compensatory education to the Student.

DUE PROCESS REQUEST

The hearing officer finds no evidence that the Parent requested due process before January 2008. The Parent testified that he had requested due process in 2006, but it was clear that he was confused about the year. At first, he seemed to say that it was 2006, but then he seemed to say that it was 2007 or 2008. The hearing officer cannot find that he requested due process before January 2008, because his testimony was so uncertain about the previous years, and whether he participated in requests for due process made by the Grandmother. (FF 9, 10; NT 80-84, 117.)

The Parent's testimony was difficult to credit, because the Parent repeatedly expressed that he was having problems remembering events, even recent events. He also had trouble concentrating and understanding the questions. He often seemed confused. Meanwhile the Grandmother tried to "fill in the blanks" that he left in the record. It was obvious that Parent's mother, the Student's Grandmother, was attempting to control all of his actions and statements during the hearing. The Grandmother repeatedly interrupted and attempted to prompt the Parent during the hearing. Sometimes the Parent expressed frustration with these attempts. Eventually, the Parent asked his mother to stop attempting to help him, and she did reduce her prompting when he asked her to do so.

The hearing officer finds that the Parent was sincerely and honestly concerned for his [child]. He fully cooperated during the hearing, and he was truthful. However, the hearing officer must give his testimony less weight because of his lack of memory for many basic facts.

The Grandmother testified that she and the Parent had faxed a request for due process to the District in February 2006. However, she pointed to a date in 2007 when she and the Parent (who did not have physical custody at the time) took the Student to the hospital. (NT 117-118; P-1 p. 5.) Thus, the correct year would seem to be 2007, based upon the Grandmother's testimony attempting to fix the date with reference to the hospital visit. (FF 9.) Under the circumstances, and taking the entire record into consideration, the hearing officer finds that the evidence is insufficient to prove that there was a request in 2006.

The hearing officer observes that the Grandmother is articulate and often takes control of communications on behalf of her son, in order to help him. Even if there was a request, the hearing officer finds, considering the entire record, that the District, if it received a due process request in 2006 or early 2007, would have reasonably interpreted it as coming from the Grandmother, not the Parent, and would have deferred

appropriately to the Mother, who had physical custody during school hours. (NT 97, 105-106; P-4.)

This is important because the District was on notice at that time that the Parent had joint legal custody of the Student with the Student's mother. (FF 1.) This was in the September 2005 custody order that they were given or at least that they read. The order did not award any legal custody to the Grandmother. The child was not placed with the Grandmother. Ordinarily, grandmothers are not presumed to have legal custody, and there was no order giving the Grandmother any legal custody.

Therefore, the District was not obligated under the law to respond to a request for due process from the Grandmother under these facts. 34 C.F.R. §300.30 ("parent" means biological parent, guardian, or grandparent with whom the child lives, if acting in place of the parent); 34 C.F.R. §300.300 (consent to be obtained from parent.) If there was such a request, their failure to honor it did not violate the law. Given this and the inadequate evidence of any request at all, the hearing officer finds that there was no violation of the IDEA regarding any due process request in 2006 or 2007.

As to 2008, the Grandmother recounted many events that led to this due process hearing, events that she found to be inappropriate. While these events deserve concern, especially for the impact that they may have had on the family, the hearing officer finds no evidence that the District responded inappropriately to the due process request, as described by the Grandmother. At any rate, the hearing was provided, and the Parent and Grandmother are not claiming that the Student received an inadequate education when the Student was in the school in Father's neighborhood.

Thus, there can be no award of compensatory education for the period between November 2007 and June 2008. Even when a district fails to comply with procedures required by the IDEA, a hearing officer cannot order compensatory education unless the district's behavior deprived the child of educational benefit. C.M. v. Board of Education of the Union County Regional High School District, 2005 U.S. App. LEXIS 6821 (3rd Cir. 2005). The party that asks for compensatory education must prove that this happened. Here there is no evidence that this happened in 2008. (FF 14.)

The District argues that it had no obligation to respond to a request for due process at all. It argues that the Parent must file for due process. Indeed, the law does require the person making the due process request to send a copy to the state; it does not require the party receiving the request to send it on to the state. 34 C.F.R. §300.508(a). Because the hearing officer finds that the evidence does not prove that the Parent requested due process in 2006 or 2007, and finds no evidence of irregularity in 2008, it is not necessary to decide this issue.

EVALUATION DELAY

The Parent argues that the District did not perform an evaluation in a timely fashion in the 2006-2007 school year, after he requested them to evaluate the Student pursuant to a court order. He also argues that the evaluation was incorrect in that it did not identify the child with a learning disability. The hearing officer will not order compensatory education on these grounds.

Again, the Parent's lack of memory for the events at issue reduces the weight of his testimony. However, the hearing officer accepts and gives weight to his assertion that he and the Student's Mother asked the District to evaluate the Student and that the District agreed to do so in November 2006⁴. (FF 2, 3.) This was shortly after the court ordered him and the Mother to seek an evaluation. (FF 2.) The Parent's testimony to this effect is credible and the hearing officer accepts it. In addition, a Permission to Evaluate form was signed on the same day of the request. (FF 4.) The District evaluated the Student, and in May 2007 it found Student ineligible. (FF 5, 6.)

Thus, there was a delay of about five months from the time of the request to the time of the report. (FF 2, 6.) The law allows districts sixty school days after receipt of the permission to evaluate in order to complete an evaluation. 34 C.F.R. §300.301 (c)(1)(ii); 22 Pa. Code §14.123. Clearly, the District failed to comply with the procedural requirements of the law by issuing an evaluation report more than sixty school days after the permission form was signed. The District also failed to comply with the law by failing to notify the Parent that it found the Student ineligible. (FF 6.) This too was a procedural violation. 34 C.F.R. §300.503.

However, this does not prove that compensatory education should be awarded in this case. As explained above, the law allows compensatory education only where a procedural violation has damaged the student's education in some way. Here there is no proof that the Student did not receive meaningful educational benefit, and there is no proof that if the District had done its evaluation on time, this would have led to better services for the Student. There simply is no reliable evidence of either of these things.

There is no evidence that the evaluation was incorrect. The Grandparent pointed out that the scores obtained in the evaluation were higher than those obtained later by the independent evaluator. (S-2, S-3.) She accused the District of inflating the Student's scores on these earlier tests. (NT 124-129.) She bases this partially on alleged statements by the independent evaluator that he did not understand the District's scores from the previous year. (NT 126.) However, this assertion is contradicted by the record, because the evaluator in his written report indicated other reasons why the scores might be different. He suggested that other problems have emerged that were not apparent to the District's evaluator one year before. (S-3 p. 7.)⁵ The Parent offered no evidence that

⁴ The Parent fixed the date in December, but as to the exact date, the hearing officer gives more weight to the District witness' recollection of events. (FF 3.)

⁵ It is well known that a young child does not always demonstrate in school that he or she has educational needs due to disabling conditions. The period in question is the Student's second grade year. It is not uncommon for learning disabilities to become apparent in

the District's scores were incorrect at the time that the Student was tested. Since there was no evidence that the evaluation was incorrect, the Parent could not prove that the Student was deprived of any educational benefit due to any delay in the evaluation.

PROGRAM AND PLACEMENT

The Parent introduced very little evidence to show any deficiencies in the District's programming. He introduced no IEP. As noted above, he did not show that the District failed to identify the Student when it should have done so. There was evidence of underperformance, but this was not shown to be the result of any failure of the School District. Indeed, the Student's problems in the early grades may have been due to the custody struggles between the parents, with its possible effect on Student's ability to work, on Student's attendance, and the fact that Student transferred from the school in Mother's neighborhood to the school in Father's neighborhood and back again several times. (FF 12, 13.)

The hearing officer is not finding that this was the cause; rather, he finds that there was no evidence that the lack of special education services caused the Student's struggles. There is no evidence that the Student's [medical] condition contributed to Student's academic struggles, either. Although it was alleged that Student could not concentrate, (FF 7), there was insufficient evidence to show that this discomfort resulted in loss of educational benefit to any meaningful degree. The absenteeism partially attributed to this in the records was the only evidence, and the hearing officer finds it insufficient. Therefore, the record shows by a preponderance of evidence that the District did not deprive the Student of meaningful educational benefit during the relevant period of time.

CONCLUSION

The Parent has failed to show that the District delayed in facilitating any due process request, and that this deprived the Student of educational benefit. Similarly, the Parent has failed to show that the District harmed the Student by delaying its evaluation during the 2006-2007 school year. Therefore, the hearing officer will not award compensatory education to the Student.

third grade or later. Thus, the independent evaluator's written reference to emerging needs not previously seen is a reasonable explanation for the Student's decline in scores and school performance from the first evaluation in May 2007 until the independent evaluation in March 2008. (S-2, S-3.) This is particularly so regarding reading scores, because the Student was on grade level in reading comprehension, even by March 2008. (FF 11.)

ORDER

1. The District did not deprive the Student of a free appropriate public education by failing to forward a due process request to the Office for Dispute Resolution during the 2006-2007 or 2007-2008 school year.
2. The District did not deprive the Student of a free appropriate public education by failing to re-evaluate the Student in a timely fashion.
3. There is insufficient evidence of record to prove that the District offered an inappropriate educational program and placement to the Student during the 2006-2007 or 2007-2008 school year.
4. Compensatory education will not be awarded for the 2006-2007 or 2007-2008 school year.

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

June 7, 2008