

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

DUE PROCESS HEARING

Name of Child: MT
ODR #8695/07-08 KE

Date of Birth:
xx/xx/xx

Date of Hearing:
June 10, 2008

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

School District of Philadelphia
440 North Broad Street, 3rd Floor
Philadelphia, Pennsylvania 19130

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:
Heidi Konkler, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, Pennsylvania 19312

Miles Shore, Esquire
Mimi Rose, Esquire
School District of Philadelphia
440 N. Broad Street, 3rd Floor
Philadelphia, Pennsylvania 19130

July 28, 2008

August 11, 2008

Linda M. Valentini, Psy.D.

Background

This matter addresses a dispute about the period of time for which the District is potentially responsible for tuition reimbursement for a parentally selected placement. In January 2006 a due process hearing was held; in February 2006 the hearing officer found that the District's IEP was inappropriate and ordered tuition reimbursement for a specific period. The Appeals Panel, in April 2006, reversed the Hearing Officer. In January 2008 the Federal Court for the Eastern District reversed the Appeals Panel, finding that the District was responsible for tuition reimbursement for a specific period that ended on January 26, 2006 which was the last day of the due process hearing. The court declined to address the period from January 26, 2006 to the end of the student's placement on July 29, 2006, reasoning that administrative remedies had not been exhausted for that period. The parties are not currently in dispute in this forum about the substantive merits of the case, they simply disagree on the start date for reimbursement.

On the scheduled hearing date the parties through counsel presented opening statements and entered joint exhibits. They were instructed to submit written closing arguments by a date certain. The student's father testified briefly; the parties agreed that no further testimony was necessary.

Issues

What is the start date for the potential tuition reimbursement period at [residential center] ending on July 29, 2006?

Findings of Fact

1. On April 13, 2005 the Parents filed for a due process hearing, later withdrawing their request as efforts were being made towards resolution. (J-1)
2. On November 2, 2005, as resolution was not reached, the Parents re-filed for a due process hearing, asking for "tuition reimbursement for the 2004-2005 and 2005-2006 school years". (J-1a)
3. A due process hearing was held on January 9 and January 26, 2006. (J-2, J-3)
4. *Inter alia* the Hearing Officer found that the District's November 16, 2005 IEP was substantially flawed. The District did not offer another IEP. (J-4)
5. The November 16, 2005 IEP provided that the student was eligible for ESY services. (J-4, FF 21)
6. The Hearing Officer found that a District psychologist said the student needed residential placement, that another District psychologist said that the student's

“medical and educational needs were not severable” and that a private psychiatrist said that the student’s “educational and psychiatric/medical needs were intertwined” such that residential placement was necessary. (J-4, FF 11b, FF 16 and FF 19)

7. On February 28, 2006 the hearing officer issued his decision, finding partially in favor of the Parents, and in his discussion under “Equities” wrote, “Thus I will award reimbursement to Student’s parents for the costs of [residential center] from the date of Student’s placement on May 23, 2005 to the present”. (J-4)
8. The hearing officer’s February 28, 2006 Order reads as follows: “Student has been denied a free and appropriate public education since May 23, 2005; and The School District shall reimburse Student’s parents [a specific amount] for the costs of [residential center]”. (J-4)
9. On April 24, 2006 the Appeals Panel reversed the hearing officer, finding that the IEP was adequate and appropriate, that no compensatory education was due and that no tuition reimbursement was due. (J-5)
10. On May 31, 2006 the Parents filed a civil action in the United States District Court for the Eastern District petitioning *inter alia* that the Appeals Panel decision be reversed. (J-6)
11. On January 31, 2008 the court ordered *inter alia* that the District should reimburse the Parents “for all expenses incurred from October 12, 2005 until January 26, 2006”. (J-7)
12. The court declined to award reimbursement for the period from January 26, 2006 to the Student’s discharge from the placement on July 29, 2006 finding that administrative remedies for that period had not been exhausted. (J-7)
13. The court issued an order on May 27, 2008 that the District reimburse the Parents a specific amount for the student’s placement “for the period from October 12, 2005 through January 26, 2006”. (J-9)
14. On February 7, 2008 the Parents sent a request for hearing to the District, seeking tuition reimbursement for the student’s placement from January 26, 2006 through July 29, 2006. The District did not convene a Resolution Meeting or provide either prior written notice or an Answer to the Parents’ complaint. (J-8)
15. On March 28, 2008 the Parents sent a copy of the hearing request to the Office for Dispute Resolution. The request was received by ODR on March 31, 2008. (HO-1)¹

¹ This is the cover sheet for the Parents’ transmittal of the hearing request to ODR and contains the ODR date stamp. It was sent to the hearing officer along with other routine case materials when the matter was assigned.

16. In this forum the parties are only disputing the period between January 26, 2006 to/through March 28, 2006. (NT 29)

Legal Basis

Burden of Proof –

The Parents requested this hearing and therefore they bore the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case.

Authority –

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* The IDEIA’s implementing regulations are found at 34 CFR §300 *et seq.* Eligible students are entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

Time Limitations on Filing –

Since their July 1, 2005 effective date, the new provisions of the IDEIA require a parent or agency to request a due process hearing within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. *See* 20 U.S.C. § 1415(f)(3)(C).

IDEIA and the subsequent regulations permit two specific exceptions to the two-year limit:

- (D) EXCEPTIONS TO THE TIMELINE.-The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to –
- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
 - (ii) the local educational agency’s withholding of information from the parent that was required under this part to be provided to the parent.
- 20 U.S.C. § 1415(f)(3)(D)

Filing a Due Process Complaint—

The IDEIA’s implementing regulations at 34 C.F.R. Section 300.508 state:

Due Process Complaint.

(a) General

- (1) The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).
- (2) The party filing a due process complaint must forward a copy of the due process complaint to the SEA.

[Section (a)(2) is new language added to the previous federal regulations.]

Pendency –

The IDEIA provides as follows:

Maintenance of Current Educational Placement

Except as provided [regarding disciplinary placements], during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child.²

The federal regulations provide as follows:

300.518 Child’s Status During Proceedings

² The statute continues, “or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed”. The absence of a comma after the phrase ‘public school program’ renders the meaning unclear as to whether the completion of all proceedings applies to just the ‘initial admission’ situation or to ‘any proceedings’.

(a) Except as provided [regarding disciplinary placements] during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a hearing under 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or Student current educational placement.

(d) If the hearing officer in a due process hearing conducted by the SEA or a state review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for the purposes of paragraph (a) of this section.

Discussion

This matter is nuanced, beginning with the discrepancy among a) Parents' November 2005 Complaint which among other things asked for tuition reimbursement "for the 2004-2005 and the 2005-2006 school years"; b) the issue as stated in the hearing officer's February 28, 2006 Decision being "whether or not Student's parents are entitled to tuition reimbursement at various points from December 29, 2004 to present"; and, c) the hearing officer's Order that "Student has been denied a free and appropriate public education since May 23, 2005" and "The School District shall reimburse Student's parents [a specified amount] for the costs of [residential center]". Neither party seems to have attempted to reconcile the Complaint with the Decision and/or with the Order; nor is there a specific mention of these discrepancies in the Appeals Panel decision.

An interpretation of the hearing officer's "to present" can be from the date that the hearing ended (January 26, 2006), from the date that the hearing officer rendered his decision (February 28, 2006), or ongoing. In cases where regulations need to be interpreted, when the regulation is ambiguous, the plain words of the regulation should control. Chevron U.S.S., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984). Obviously a hearing officer's order is not a regulation, but the common sense rule of thumb that looks at plain language is useful here. The hearing officer made it clear in his decision that he found the Parents' unilateral placement at [residential center] necessary for the student to receive FAPE. In his opinion, the District had not offered an appropriate IEP in November 2005 and there is no record of the District's offering another IEP after November 2005. It is this current hearing officer's opinion that, in the most parsimonious interpretation, "to present" means at the very least to the date of the hearing officer's February 28, 2006 order for tuition reimbursement. Whether or not it also means "continuing onward", or "to the end of the school year", or when the District offers an appropriate program/placement, or to the student's discharge from the program is debatable but such debate is not necessary here.

This hearing officer finds for the Parents in this case for several reasons as discussed below.

1. The Parents continually asserted the same claims: When the Parents filed for due process in November 2005 (after filing in April 2005 and withdrawing in favor of settlement attempts) they asserted a claim for the 2005-2006 school year. At no time did they withdraw this claim, although they were less than vigilant in preserving it by, for example, requesting that the hearing officer clarify his order and/or by taking exception to the order through the appeal process, and/or by clarifying their request in their May 31, 2006 petition to federal court (wherein they asked the court to order reimbursement for tuition and related expenses of the placement(s) “from December 29, 2004 to the present”).³

The Parents put forth a claim for the entire 2005-2006 school year in their November 2005 Complaint, and they put forth a claim at least until May 31, 2006 in their Petition to Federal Court on that date. They had been asserting their claim all along, and with respect to the court’s ruling that they had not exhausted administrative remedies for the period after January 26, 2006 they asserted the same claim again. This hearing officer considers their original filing date preserved with respect to any limitations period, and views their claim as ongoing.

2. Pendency attached to the [residential center] placement until the hearing officer’s ruling was reversed by the Appeals Panel: The IDEIA and its implementing regulations provide for pendency “[during] any administrative or judicial proceeding” (emphasis added). When the hearing officer issued his order, pendency attached to the Parents’ unilateral placement and continued until the Appeals Panel rendered its decision on April 24, 2006. Had the Appeals Panel upheld the hearing officer, the [residential center] placement would have been treated as an agreement between the State and the Parents such that the student would remain in that placement funded by the District. However, in this case the Appeals Panel reversed the hearing officer. It is this current hearing officer’s arguable belief that in the absence of a direct order from the court to preserve/reestablish pendency, the Appeals Panel’s reversal of the hearing officer stopped pendency from April 24, 2006 onward and the court’s January 31, 2008 ruling did not serve to reestablish pendency. Pendency however did attach up until April 24, 2006.

The Parents filed their recent Complaint within two years of April 24, 2006 (February 7, 2008 to the District and a copy on March 28, 2008 to the SEA) and therefore satisfied the two-year statutory limitation if the original filing date, for some reason, should not be considered preserved and the complaint ongoing.

3. The Parents’ February 7, 2008 letter to the District requesting a due process hearing satisfied the regulatory requirements: Having learned that the court was requiring that they exhaust administrative remedies for the period from January 26, 2006 onward, the Parents on February 7, 2008 served the District with a Complaint letter, requesting a due process hearing. There is nothing in the record to suggest that the District provided prior written notice or an Answer to the Parents’ Complaint, nor that the District convened the mandatory Resolution Meeting.

³ The Parents asked the federal court to consider pendency but the court did not. (J-6; J-7)

Again, Chevron's guidance on plain language is helpful and specifically on point as attention is now turned to a regulation. The plain language of the federal regulations is that the date a complaint is received by the opposing party is when all time considerations begin. My rationale is based first on 34 CFR §300.508(a)(1) that requires either party "to provide the other party a due process complaint." In the Regulations, that requirement comes first, before section 34 CFR §300.508(a)(2) that requires that the party "forward a copy of the due process complaint to the SEA." In other words, the original complaint must go to the opposing party [part (a)(1)] and a copy of that original complaint goes to the SEA [part (a)(2)].

Second, my rationale is based on 34 CFR §300.508(d)(1) that explicitly talks about the timing of a sufficiency challenge, requiring the receiving party to file a sufficiency challenge "within 15 days of receipt of the due process complaint." Note, this does not say 15 days from receipt by the SEA. It is 15 days from the time the receiving party actually received the complaint. Although that section is specific to sufficiency challenges, it would be reasonable to conclude that all other time lines should also be based on when the receiving party actually received a complaint.

And third, similar wording to the above can be found repeatedly in the Regulations. Time and time again the Regulations refer to the receipt of the complaint by the opposing party. Clearly that is the intent. Not receipt by the SEA, but specifically receipt by the opposing party, and, in the case of a parent's complaint, the Regulations specifically refer to receipt by the LEA. See 34 CFR §300.508(e)(1) "within 10 days of receiving the due process complaint," 34 CFR §300.508(f) "the party receiving a due process complaint must, within 10 days of receiving the due process complaint," 34 CFR §300.510(a)(1) "Within 15 days of receiving notice of the parent's due process complaint," 34 CFR §300.510(b)(1) "within 30 days of receipt of the due process complaint".

The Parents served the District with their request for due process on February 7, 2008, seven days (consonant with the discussion of the regulatory language above, days means calendar days, not business days or school days unless otherwise specified) after the court issued its January 31, 2008 ruling. The Parents rapidly filed for the hearing at this juncture as the court had ruled that they had to exhaust their administrative remedies for the period from January 26, 2006 onward. This filing was in response to the court's ruling and simply reasserted the claim they had been making since November 2005. Although the District faults the Parents for not promptly providing a copy of their due process request to ODR, it is notable that having received the hearing request the District neither Answered it nor convened the Resolution Meeting as per IDEIA requirements.

In addition to their original hearing request dates of November 2005 and their appeal to federal court in January 2006, Parents additionally requested this current hearing on February 7, 2008 through their letter to the District immediately upon receiving the federal court's January 31, 2008 ruling. Although it could be argued that a new two-year limitations period commenced on January 31, 2008 when the Parents learned of the court's ruling, this argument need not be made here as there is ample support for their

position in the foregoing discussion. If for some reason another forum finds neither #1 nor #2 above persuasive, then the potential recovery period would begin on February 7, 2006 rather than January 26, 2006.

Order

It is hereby ordered that:

The start date for the potential tuition reimbursement period at [residential center] ending on July 29, 2006 is January 26, 2006.

August 11, 2008
Date

Linda M. Valentini, Psy.D.
Linda M. Valentini, Psy.D.
Hearing Officer