

This is a redacted version of the original hearing officer decision. Select details may 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: [REDACTED]

Date of Birth: [REDACTED]

Dates of Hearing: July 16, July 18, July 25, August 13, August 18, 1008

OPEN HEARING

ODR No. 8729/07-08 LS

Parties to the Hearing:

Representative:

Donna Kapes
5032 Mohawk Drive
Schnecksville, PA 18078

Pro Se

Joseph Kapes
146 Briar Lane
Weatherly, PA 18255

Pro Se

Robert Thornburg
Director of Student Services
Parkland School District
1210 Springhouse Road
Allentown, PA 18104-2119

Joanne D. Sommer, Esq.
Eastburn and Gray, P.C.
60 East Court Street
Doylestown, PA 18901

Date Record Closed:

August 23, 2008

Date of Decision:

September 6, 2008

Hearing Officer:

Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

[REDACTED] (Student)¹ is a teenage, high-functioning autistic student who has met the School District's graduation requirements. Student contends that s/he was denied a free and appropriate public education (FAPE) over the last two school years and Student contests the proposed educational program and placement offered by the School District for the upcoming school year. For the reasons described below, I find for the Student.

ISSUES

- Whether the School District provided FAPE to Student for the 2006-2007 and 2007-2008 school years?
- Whether the School District's proposed 2008-2008 program and placement is appropriate?

FINDINGS OF FACT

- 1) Student is a teenager who has been diagnosed with attention deficit hyperactivity disorder with impulsivity, obsessive-compulsive disorder with anxiety, an autism spectrum disorder, and above average cognitive and academic abilities. (N.T. 64; SD7,p.5)² For at least twelve years, Student has been educated in the regular education environment with a 1:1 aide. (N.T. 15, 248; P21,p.6; SD1,p.1) Student also has received mental health/mental retardation therapeutic autistic support (TAS) services since at least December 2003. (N.T. 331) Student's most recent

¹ All future references to [REDACTED] will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

² References to "N.T." refer to the hearing transcripts. References to "P" and "SD" refer to Parent and School District exhibits, respectively.

- goals with the TAS were socialization, independent living, expressing emotions, and organization with homework. (N.T. 332)
- 2) The parties agree that Student has always done well academically and has complied with the School District's graduation requirements. (N.T. 903, 1095) Student's goals for transition from high school always have been college attendance and Student's course selections, which always have been left to Student and Parent with no objection from the School District, always have been geared toward the academic courses needed to get into college. (N.T. 502, 1087-1088)
- 3) During the 2006-2007 school year, Student's 1:1 classroom aide took a complete, redundant set of class notes in every class as a back-up for Student's classroom notes. (N.T. 691-692; SD1,p.1) In the spring semester of the 2007-2008 school year, the parties began discussing a reduction of the 1:1 classroom aide services, and in May 2007, the parties agreed to reduce the 1:1 aide's assistance to Student. (N.T. 15, 439-440, 448, 528, 534, 714-715, 1243; SD16) The parties disagree over whether or not the School District sent to Student's parent a copy of an IEP documenting their agreement; the School District contends that it did so in this case because it always sends revised IEPs to parents (N.T. 253, 537-538, 540-541, 573, 715-716, 1244; SD7,p.22); Student's parent contends that she never received a May 2007 revised IEP and never knew of its existence until the next, January 2008 IEP meeting. (N.T. 573) The only difference between the May 2007 IEP and the previous December 2006 IEP are two boxes in the modifications and

- specially designed instruction section describing the aide's functions; the goals remain the same in both IEPs. (P21,p.23; SD7,p.22)
- 4) As a private, outside activity that was not part of Student's public education program, Student took a Japanese language class at a local community college (CC) without a 1:1 aide in the classroom. (N.T. 109) During summer 2007, Student worked at a local amusement park one day per week for 5 hours. (N.T. 121) Student was first assigned to work at a ticket booth because Student had good math skills. When the ticket booth job was difficult and upsetting to Student, Student was moved to an office filing job. (N.T. 141-142) At the end of the summer, Student was rated Satisfactory in all areas except displaying initiative, adapting work place to meet demands, and serving guests in a friendly, courteous and efficient manner. (N.T. 144; P18)
 - 5) Student's December 2006 and May 2007 IEPs contained the same goals in reading comprehension, written expression, social skills, organization and recording of daily assignments, decision making, and staying awake in class. (P21,pp.14-21;SD7, pp.13-20) Student's functional skills on both IEPs were listed as age appropriate. (N.T. 439, 490-491, 493, 501-502, 1087, 1243; SD7,p.6; P21,p.7)
 - 6) Writing was a large requirement of Student's college preparatory English class and Student's written products were always above the middle of the class. (N.T. 157) Student completed essay tests independently, albeit sometimes in the learning support room. (N.T. 148, 152, 157, 167, 219) Student's teachers believe that Student independently wrote her essay paper on adoption, while Student's

- parent disagrees. (N.T. 158-159, 935-937) Student's own testimony on this subject is not credible because it varied so greatly, vacillating from "not much [help]", to "a lot, sorry" to "I don't remember." (N.T. 41, 55)
- 7) During the 2007-2008 school year, Student's part-time 1:1 aide sat in the back of some of Student's classes. The aide's function was to: take notes as a back-up for Student's class notes and assignment lists; assist Student in remaining on task; and assist Student when not feeling well or when needing to leave the classroom to visit the school nurse to take an exam elsewhere. (N.T. 511, 514, 903, 1133, 1144) Every day, Student brought a daily organization sheet to the Learning Support classroom that Student's 1:1 aide or the Learning Support teacher would review for organization as well as accuracy of homework assignments. (SD23; N.T. 908) One period per week, usually on a Friday, the 1:1 aide and/or the learning support teacher would sit down with Student and sort out Student's folders, remove unnecessary papers and reorganize misfiled papers. (N.T. 1136, 1234) The 1:1 aide also created for Student a checklist of procedures for writing a research paper. (N.T. 185; SD29F, p.3)
- 8) Student did not have IEP goals explicitly relating to her frequent visits to the nurse's office or crying in class. Sometimes Student arrived late to class because she had visited the nurse's office before class. (N.T. 163-164) Student cried in English class monthly, and once had a hard time stopping. (N.T. 203, 214)
- 9) The high school guidance counselor met with Student to discuss Student's career interests, help search for colleges, review the SAT process, and look at the college admission, application, and financial aid processes. (N.T. 1090-1091; SD37) The

guidance counselor also obtained information for Student regarding application for post-graduation services from the Office for Vocational Rehabilitation (OVR). (SD20; N.T. 1096-1097, 1107) Student visited three colleges and attended a transition workshop at a college to learn about self-disclosure in college, knowing the rights of a student with a disability, learning what is dorm life is like, and the skills, such as study skills, needed in college. (N.T. 125-126, 531, 562-563, 961, 1166; SD37)

10) In January 2008, Student's IEP team met for its annual review. (N.T. 547-548, 953) The School District School reported that Student had mastered the IEP goals,³ and was on track to graduate in June 2008. (N.T. 945; SD41, p.1; P23) The learning support teacher considered Student's alertness goal (to be awake and alert 100% of the time) to be mastered if Student's sleeping or non-alertness during class did not impact Student's grades. (N.T. 623-626, 1038-1039, 1041; SD7; P20; P21,p.21; SD41,pp.4,5) She considered the IEP writing goal of achieving 3 of 4 on a writing rubric, or showing proficiency, to be mastered if Student achieved an overall 75% grade in the class. (SD41, p.1; N.T. 1002) Student's Parent and TAS testified that the School District's Special Education Director stated that the School District is not responsible for helping Student transition to college. (N.T. 262-263, 265, 1081-1082) School District personnel deny that the School District's Special Education Director stated this. (N.T. 546, 1099)

³ The School District cannot explain why subsequent IEPs do not also indicate mastery of the same goals. (P23; N.T. 1299)

- 11) A persistent disagreement between the parties during the 2007-2008 school year concerned Student's need for a 1:1 aide in the classroom. (SD16, p.1; 542-543) Student's 1:1 classroom aide had worked part-time (25 hours per week) from September 2007 through March 19, 2008. School District personnel informed Student's parent in January 2008 that they believed Student could independently attend college without a 1:1 classroom aide. (N.T. 569-570, 955) The aide began working full-time in March 2008 in response to the argument of Student's parent that she had never received the May 2007 IEP reducing the aide's hours from full-time to part-time. (N.T. 460, 514, 579, 1132, 1146-1147, 1149; SD28)
- 12) While in the classroom itself, Student required minimal assistance from the aide. (N.T. 903) The aide took redundant class notes - Student's own notes were sparse, but hit the key points. (N.T. 1134) The aide also took redundant notes of assignments - Student's own assignment notes usually were accurate, but occasionally missed verbal assignments given at the end of class when Student was gathering books. (N.T. 1144) The aide also assisted Student in determining when would be a good time to stop by the nurse's office, both during and in between classes. (N.T. 1198)
- 13) Substantial disagreement exists between the parties regarding both the number of times that Student visited the nurse's office during 2006-2007 and 2007-2008, and the significance of those visits. School District Health Room records indicate 43 visits in 2006-2007 (P3,pp.3-4) and 84 visits in 2007-2008. (P3,pp.4-9)
- a. In 2006-2007, after noticing that Student's visits to the nurse often ended in Student calling home to be excused from school, the parties agreed to a

reward system designed, not to reduce the number of times that Student visited the nurse's office, but to reduce the number of times Student called home from the nurse's office. (SD3,pp.1,11) Although substantial time was spent at hearing disputing whether this reward system was implemented correctly, the system was effective in reducing the number of times that Student called home after visiting the nurse's office. (N.T. 136-137, 282, 432, 723-724, 949-951, 970-972, 975, 987, 990, 1088-1089, 1139, 1152)

- b. During 2007-2008, the parties discussed the number of nurse's visits themselves. The IEP does not have a goal regarding nurse visits. (N.T. 407) Student's parent, however, believes that allowing Student's numerous nurse visits in high school did not prepare Student for transition to college, and that the number of visits demonstrates that Student is not prepared to attend college without a 1:1 aide. (N.T. 407) Without actually counting the number of visits, the School District concluded that the number of nurse visits was not excessive because the amount of class time missed was not significant. (N.T. 977) Further, the School District considers Student's nurse visits to be indicative of Student's self-advocacy skills, because those were times when Student self-advocated that she wanted to visit the nurse. (N.T. 911, 940)

14) During the 2007-2008 school year, the School District made available to Student Windows XP voice recognition software. When Student indicated a preference to type on a keyboard instead of using the software, the School District did not

investigate whether Student's preference was based upon the ineffectiveness of Windows XP. (N.T. 665, 707, 729-730, 976, 1146, 1185) In Spring 2008, Student began receiving outside occupational therapy (OT) services, including training in the Dragon Naturally Speaking voice recognition software, which Student prefers over Windows XP. (N.T. 25-26, 247, 703; P15) Student's private OT reports that Student types nine words per minute, compared to the average 14-16 wpm expected of children Student's age. (N.T. 864-865:P15) Student's private OT is considering, but not yet recommending, that Student use a personal digital assistant (PDA) to assist in organizational skills. (N.T. 873-874)

15) On March 18, 2008, Student's Parent requested an independent evaluation of Student. (P27; SD31,p.15)

16) On April 8, 2008, pursuant to Parent's request, a School District psychologist administered to Student the Spelling and Written Expression subtests of the Wechsler Individual Achievement Test (WIAT), 2nd Ed. Student's results on these subtests, as well as comparable scores two years earlier are as follows (SD33; P22; N.T. 14-15):

	2006 Spelling	2008 Spelling	2006 Written Expression	2008 Written Expression	2006 Composite	2008 Composite
Standard Score	121	115	81	94	100	209
Percentile Rank	92	84	10	34	50	61
Range	Superior	High Average	Low Average	Average		
Age Equivalent		>19:11		14:0		
Grade Equivalent		>12:9		8:8		

17) In April 2008, Student's parent gave to the IEP team a list of transition concerns relating to Student's functional and living skills needs. (P28; N.T. 175-176, 483, 575-576) Student's Parent was unaware before spring 2008 that the School District had any responsibility regarding transition concerns relating to Student's hygiene, self-care and independent living skills needs. (N.T. 429, 436-437)

18) In April 2008, the parties engaged in a facilitated IEP meeting. The School District then offered to Student an IEP for the 2008-2009 school year. (N.T. 580-581, 946, 1251, 1256; SD34)

- a. Student's academic, developmental and functional needs were described as needs to: increase transition skills in area of independent living; familiarize with supports available on the post secondary level; increase independence in course work by attending classes without support; and continue to develop social skills and perspective taking in structured and unstructured settings. (SD34,p.13)
- b. To meet these needs, the April 2008 IEP offers: learning support services on School District property to assist Student in organization, in studying class notes, as well as to work on a computer (N.T. 585, 957, 1255; SD34,p.27); various CC courses, provided on School District property, for which Student can receive CC credit, and for which Student must pay any tuition costs (N.T. 499, 584-585, 957, 1099-1100, 1251-1252; SD34,p.16); a part-time teaching assistant to accompany Student on twice-monthly trips to CC to orient and acclimate student to the CC campus, and to make sure Student knew where the CC library was and where the

disabilities counselor was (N.T. 957, 1254; SD34,pp.27,28); and high school level living skills classes. (N.T. 957; SD34,p.25)

19) Student testified that she does not want to return to the School District campus in 2008-2009 because it would feel weird. (N.T. 114) Student's parent characterizes this as Student's refusal to return to School District campus. (N.T. 268, 270)

20) Student's developmental behavioral pediatrician, who is board certified in pediatrics with a subspecialty in developmental behavioral pediatrics, has worked for over twenty years with a variety of special needs children, and has been seeing Student since January 1995, believes Student will need a one-to-one aide in college. (N.T. 62, 240) This is based upon: Student's irrelevant answers to the pediatrician's questions during a June 18, 2008 evaluation that revealed unrealistic expectations about college (N.T. 66-67); and Student's history of not making social connections, which indicates that Student will have great difficulty handling downtime between college classes, i.e., not knowing what to do and where to go. (N.T. 68) Student's pediatrician has never spoken to anyone at school, never observed Student at school, and had not seen Student between October 11, 2004 and May 2008. (N.T. 71, 88) The pediatrician assumes that college-level disability supports are aimed at children with disabilities that are less severe than Student's. (N.T. 98)

21) The following anecdotes were offered at hearing to prove generally that Student requires a 1:1 aide in college classes: Student requires daily prompting and reminders to eat breakfast, bathe, groom, and wear clean, matching clothes (N.T. 24, 252, 372); during a graduation party at a restaurant at which Student had

- invited friends, Student ignored the friends, put on headphones, and started playing a Game Boy (N.T. 339-340); Student needs reminders to perform chores and exercises much less personal responsibility than Student's younger siblings (N.T. 252); Student's TAS had to encourage Student not to wear an unseasonal winter dress and boots for a summer graduation ceremony, and to change into a more seasonal dress and sandals. (N.T. 344-345, 389)
- 22) The following anecdotes were offered at hearing to prove generally that Student does not require a 1:1 aide in college classes: in geometry class, Student asked the teacher to change seats because the students nearby were loud and annoying (N.T. 118-119, 940); Student attended prom (N.T. 105, 943-944); and Student informed teachers when Student had to miss class in order to attend baccalaureate program meetings. (N.T. 941, 1064)
- 23) The parties have never had a clear, mutual understanding of either the skills that Student will require for college success or the disability-based services that will be available to Student in college.
- a. Student's parent assumes that: Student must sit through college lectures without leaving class; Students will fail if s/he misses more than three sessions of any class; Student will require more writing and organizational tutoring services than colleges provide; Student cannot succeed in college with Student's current, poor handwriting; Student requires, but will not have, anyone to remind Student of when college class assignments are due; Student is not capable of self-disclosing and self-advocating Student's disability-based needs to college professors; Student will sleep

in class, be off task, behave emotionally and cry in class, all of which will negatively impact Student's college performance; and colleges do not provide peer support and mentoring systems. (N.T. 270, 275-276, 288, 297, 1196, 1229)

- b. School District personnel assume that: colleges provide preferential seating and the use of learning support rooms to complete tasks and take tests; any and all disability-related services required by Student will be available in college; all of Student's writing and organizational tutoring needs will be met in college; all college courses will provide syllabi with assignment deadlines, such that Student will not require any other assistance in assignment tracking; note-takers are available in all college classes; all college students can leave class whenever they want and for any reason, with no negative impact; Student will always leave class rather than sleep in class, be off task, behave emotionally and cry in class; and Student will self-disclose and self-advocate any and all disability-based needs to college professors. (N.T. 198, 569-570, 586, 955, 963, 966, 1123, 1167, 1193-1194, 1196, 1225)

24) Student intends to attend a local community college (CC). (N.T. 22) That CC's disability support services learning specialist testified that CC does not modify curriculum or provide 1:1 assistance within classrooms to assist Students' behavior or work completion. (N.T. 815, 823) CC intentionally does not inform its professors of a student's disability because CC requires the students themselves to do so. (N.T. 840) CC offers extra time for exams and quizzes; a

note-taker, who is usually a peer, but can be a paid note-taker; and use of a word processor to complete written assignments. (N.T. 815-816, 831-832) CC offers writing tutors, reading tutors, and study skills tutors, upon appointment for up to two hours per week, depending upon tutor availability. (N.T. 816-819) CC also offers one hour weekly 1:1 meetings with the disability support services learning specialist upon appointment and depending upon availability. (N.T. 817-818) In this case, the parties stipulate that a note-taker would be available to Student at CC, either through a peer or a paid note-taker, that college syllabi would be available to Student, and that Student's CC professors would have web sites with information about upcoming assignments. (N.T. 1169)

- 25) CC's disability support services learning specialist has met with Student twice, during which the conversations quickly broke down and Student began to cry. (N.T. 821-822) The specialist does not believe, based upon what she's seen, that Student could self-disclose and request disability-based accommodations from CC professors (N.T. 819-821)
- 26) CC uses the COMPASS test, a standardized test created by ACT in writing, reading and math, for placement purposes for entering students. (N.T. 781) A COMPASS score of 28 to 65 in writing skills results in student placement in English 100, which is just below college level writing. (N.T. 782, 804) College credit for English 100 is not typically transferable to 4 year colleges. (N.T. 808) 40% of CC's incoming freshmen take English 100. (N.T. 804-807) Student unnecessarily took the COMPASS score, through the oversight of a new CC

employee, received a 61 score, and consequently is required by CC to take English 100. (N.T. 798, 801; SD16)

27) Student's Parent believes that Lehigh University plans to implement a new program called "Transitions", in which graduate students will be paired with autistic college students, will attend classes with the students, and will assist the autistic students in navigating through college. (N.T. 753; SD15,pp.1,4,5)

28) Sometime during Spring 2008, Student's Parent filed a complaint with the Division of Compliance, Bureau of Special Education, Pennsylvania Department of Education, which has suspended its investigation pending this due process hearing. (N.T. 1273)

29) Student requested this due process hearing on April 15, 2008. The parties conducted a mandatory resolution meeting on May 2, 2008. (N.T. 1067) I presided in due process hearings on July 16, July 18, July 25, August 13, August 18, 2008. Exhibits introduced and either admitted or not admitted into the record were as follows:

Ex. #	Without Objection	Over Objection	Withdrawn	Admission Refused	Ex. #	Without Objection	Over Objection	Withdrawn	Admission Refused
P1	✓				SD1	✓			
P2	✓				SD2	✓			
P3	✓				SD3	✓			
P4			✓		SD4	✓			
P4A		✓			SD5		✓		
P5				✓	SD6	✓			
P6		✓			SD7		✓		
P7	✓				SD8	✓			
P8	✓				SD9	✓			
P9		✓			SD10	✓			
P10	✓				SD11	✓			
P11		✓			SD12	✓			
P12				✓	SD13	✓			
P13		✓			SD14	✓			
P14	✓				SD15	✓			
P15		✓			SD16	✓			
P16	✓				SD17	✓			
P17			✓		SD18	✓			
P18		✓			SD19	✓			
P19		✓			SD20	✓			
P20	✓				SD21	✓			
P21	✓				SD22	✓			

Ex. #	Without Objection	Over Objection	Withdrawn	Admission Refused	Ex. #	Without Objection	Over Objection	Withdrawn	Admission Refused
P22	✓				SD23	✓			
P23, pp.1-6	✓				SD24	✓			
P23, pp.7-16				✓	SD25	✓			
P24	✓				SD26	✓			
P25		✓			SD27	✓			
P26		✓			SD28	✓			
P27	✓				SD29	✓			
P28	✓				SD30	✓			
					SD31	✓			
					SD32	✓			
					SD33	✓			
					SD34	✓			
					SD35	✓			
					SD36	✓			
					SD37	✓			
					SD38	✓			
					SD39		✓		
					SD40	✓			
					SD41	✓			
					SD42	✓			
					SD43	✓			
					SD44	✓			
					SD45	✓			
					SD46	✓			
					SD47	✓			
					SD48	✓			
					SD49			✓	
					SD50	✓			
					SD51	✓			
					SD52	✓			

DISCUSSION AND CONCLUSIONS OF LAW

The United States Supreme Court has held that, in a special education administrative hearing, 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 has produced more persuasive evidence than the other

party (regardless of who seeks relief), then 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.

At age 16, a special education student's IEP must include: 1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and 2) The transition services (including courses of study) needed to assist the child in reaching those goals. 34 CFR §300.320(b) "Transition services" are defined as a coordinated set of activities for a child with a disability that: (a) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education; and (b) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes: (i) Instruction; (ii) Related services; (iii) Community experiences; (iv) The development of employment and other post-school adult living objectives; and (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. 34 CFR §300.43(a)

An IEP team must begin a transition plan by identifying the environments in which Student is likely to spend early adult life, then identify the demands of those environments, measure Student's current abilities against them, and finally develop a coordinated set of activities, services and experiences designed to narrow the gap between Student's current functioning and the demands of the chosen environments. Consideration must be given to Student's level of independent living skills and how or

whether she can compensate for any deficits. In Re the Whitehall-Coplay School District, Special Education Appeal No. 1262 (2002)

Where an IEP states that a student will identify and explore requirements of post-secondary education and training programs, but does not indicate how Student is to go about doing so other than a suggestion that the transition coordinator would provide assistance, that IEP does not provide appropriate transition programming for Student under the IDEA because it fails to describe a coordinated set of activities based on specific goals or outcomes. In addition, mere referrals to outside agencies and other resources deny FAPE in the area of transition. In Re the Sto-Rox School District, Special Education Appeal No. 1639 (2005)

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide FAPE to all Students who qualify for special education services. 20 U.S.C. § 1412 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); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998) The obligation to make FAPE available to all children with disabilities does not apply with respect to students with disabilities who have graduated from high school with a regular high school diploma. 34 C.F.R. §300.102(3)(i) A school district may not, however, unilaterally decide to award a disabled student a diploma. See, e.g., Susquehanna Township School District v. Frances J., 823 A.2d 249 (Pa. Cmwlth. 2003); Neshaminy School District v. Karla B., 25 IDELR 725, 726-27 (E.D. Pa. 1997)

CURRENT PROGRAM AND PLACEMENT

Student's parent argues that the School District's proposed April 2008 IEP forces Student to choose either to return to the high school environment or to enter the community without the one-to-one support that Student needs in the local community college. Student's parent argues that Student has needs to: self-disclose Student's disability to professors; self-monitor in class by staying awake, keeping head off desk, not wandering around, and staying on task; organize materials, breaking down complex tasks, keeping within a time table, and setting goals; develop a peer support system; and compensate for poor motor, typing and handwriting skills. Student's parent argues that, while Student has the IQ and desire to attend college, Student must be physically in the college environment, with a 1:1 aide in the classroom, to gain the skills necessary to meet Student's disability-related needs for developing and maintain relationships with professors and peers.

The School District notes everyone's agreement that Student is academically ready for college. The School District argues that, for 2008-2009, Student will have access to the same, if not more, services at the community college than she would receive at the high school, including weekly tutoring, modification of assignment deadline, course syllabi with assignments and due dates, and notes from peers or paid note-takers. Noting that Student has already taken a Japanese language course at CC without a 1:1, the School District argues that Student does not need any more programming than it currently offers in the April 2008 IEP – particularly not a 1:1 aide.

Citing In Re Council Rock School District, Special Education Appeal No. 1847 (2007), the School District argues that it was under no obligation to offer an IEP in April

2008 because Student was entitled at that time to graduate with a regular high school diploma. It is true that the obligation to make FAPE available to all children with disabilities does not apply with respect to students with disabilities who have graduated from high school with a regular high school diploma. 34 C.F.R. §300.102(3)(i) In the Council Rock case, however, the school district had issued a Notice of Recommended Educational Placement (NOREP) exiting the student from special education services. This, of course, is because a school district may not unilaterally decide to award a disabled student a diploma. See, e.g., Susquehanna Township School District v. Frances J., 823 A.2d 249 (Pa. Cmwlth. 2003); Neshaminy School District v. Karla B., 25 IDELR 725, 726-27 (E.D. Pa. 1997) In the instant case, the School District has never issued a NOREP exiting Student from special education and, in fact, actually has offered an IEP for the upcoming 2008-2009 school year. Thus, I conclude that the Council Rock case is not applicable, and I reject the School District's argument that it has no duty to Student for 2008-2009.

The April 2008 IEP functional needs description appears to be more accurate than previous IEPs because it is more consistent with the evidence produced at hearing. In the December 2006, May 2007 and January 2008 IEPs, Student's functional skills on the IEPs simply were listed as age appropriate. (N.T. 439, 490-491, 493, 501-502, 1087, 1243; SD7,p.6; P21,p.7) In April 2008, however, after a facilitated IEP meeting, the proposed 2008-2009 IEP described Student as needing to: increase transition skills in area of independent living; familiarize with supports available on the post secondary level; increase independence in course work by attending classes without support; and continue to develop social skills and perspective taking in structured and unstructured

settings. (N.T. 580-581, 946, 1251, 1256; SD34,p.13) To address Student's needs, the April 2008 IEP offers reasonable services: learning support services on School District property to assist Student in organization, in studying class notes, as well as to work on a computer (N.T. 585, 957, 1255; SD34,p.27); various CC courses, provided on School District, for which Student can receive CC credit, and for which Student must pay any tuition costs (N.T. 499, 584-585, 957, 1099-1100, 1251-1252; SD34,p.16); a part-time teaching assistant to accompany Student on twice-monthly trips to CC to orient and acclimate student to the CC campus, and to make sure Student knew where the CC library was and where the disabilities counselor was (N.T. 957, 1254; SD34,pp.27,28); and high school level living skills classes. (N.T. 957; SD34,p.25)

The crux of this dispute, however, is whether Student requires a School District funded 1:1 classroom aide in community college courses during 2008-2009. The record in this case suggests that Student probably does not. Last year, while in the classroom itself, Student required minimal assistance from the aide. (N.T. 903) The aide often assisted Student in determining when would be a good time to stop by the nurse's office, both during and in between classes. (N.T. 1198) This is consistent with the concern of Student's pediatrician who thinks Student will have great difficulty handling downtime between college classes, i.e., not knowing what to do and where to go. (N.T. 68) A 1:1 aide in the classroom itself does not directly address that concern.

I will not, however, do what everyone else in this case is doing – guess. This record lacks, as I discuss in greater detail later, a comprehensive and coordinated set of activities designed to understand more precisely what global skills Student will need in college, what services will and will not be available to Student in college, and how

Student will either acquire the necessary skills or find accommodations for them in college. Although the April 2008 IEP is an improvement over earlier IEPs, it still lacks an appropriate transition plan. It lacks any systematic analysis of Student's actual ability to self-disclose to professors, self-monitor in class by staying awake and on task, organize materials, keep within a time table, develop a peer support system, and accommodate Student's motor, typing and handwriting skills. The anecdotal and unscientific proffers by the parties are not helpful.

Development of a coordinated set of activities, within a results-oriented process, that is focused on facilitating the child's movement from school to post-school activities, including postsecondary education, is a very tall order. 34 CFR §300.43(a) It is much easier for both parties to simply suggest different transition-related services, check on their implementation periodically, and call that a transition plan. I will not base my decision in this case upon the parties' hunches. Accordingly, I will not order a 1:1 aide on CC's campus, but rather I will order that the IEP team reconvene and develop an appropriate transition plan. I recommend (but do not require) that the parties seek assistance from independent resources available through PaTTAN and the State Department of Education.

PAST PROGRAMS AND PLACEMENTS

Student argues that: the 2006-2007 and 2007-2008 IEPs failed to assist Student in gaining the written expression, organizational, and functional living skills needed to transition to the college environment; the School District's reduction of the full-time classroom aide's hours without either a properly promulgated IEP or a reevaluation was a denial of FAPE; the School District ignored repeated requests, both for an independent

evaluation and to reinstate that aide to full-time status; and the School District engaged in a continuing, secretive and deceitful plan to falsely report Student's mastery of all IEP goals in order to exit Student from School District responsibility. As compensatory education, Student seeks payment of community college classes on community college campus as well as funding of Lehigh University's transition program.

The School District argues that; despite its continuing recommendations that Student take courses designed to advance independent living skills, Student and Parent insisted on taking only courses that would prepare Student academically (as opposed to functionally) for college; the School District weaned the Student's 1:1 aide to promote transition to the less structured college academic setting; Student actually progressed from such behavior issues as crying and extensive time in the nurse's office to exercising self-control, writing down assignments, stating when Student needed extra time on assignments or tests in a different classroom, and deciding when was a good time to go to the nurse.

First, I disagree with the School District that it cannot insist upon particular IEP programming over a parent's objection. During both the 2006-2007 and 2007-2008 school years, the School District had as much right as the Parent to request a due process hearing to resolve a transition plan dispute. 20 USCA §1415(b)(6)

Second, I reject, as form over substance, the Student's argument that the School District denied FAPE by reducing the full-time classroom aide's hours without either a properly promulgated IEP or a reevaluation. The parties clearly discussed the reduction of hours, both in May 2007 as well as during the 2007-2008 school year. (N.T. 15, 439-440, 448, 528, 534, 714-715, 1243; SD16) The School District clearly revised Student's

IEP to reflect the discussion of changing the aide's hours– the only question is whether or not Student's parent received a copy of that revised IEP. (N.T. 253, 537-538, 540-541, 573, 715-716, 1244; SD7,p.22) Other than the change in the aide's hours, the May 2007 IEP was exactly the same as the previous December 2006 IEP. (P21,p.23; SD7,p.22) Thus, there was full discussion between the parties, as well as notice, of the aide's changing hours.

Further, at the time of the May 2007 discussion, there was no reason to believe that a reevaluation was necessary before trying a reduction in the aide's hours. As a private, outside activity that was not part of Student's public education program, Student had successfully taken a Japanese language class at a local community college without a 1:1 aide in the classroom. (N.T. 109) While in the classroom itself, Student required minimal assistance from the aide. (N.T. 903) Other than the aide's hours, no other changes were made in any of Student's IEP goals, specially designed instruction or related services. (P21,pp.14-21;SD7, pp.13-20) The parties were justified in trying a reduction in the aide's classroom hours without first conducting an evaluation.

I also reject Student's arguments, as best I can understand them, regarding the School District's denial of FAPE concerning voice recognition software. The facts that Student preferred typing to using the School District's Windows XP software, and that Student's private OT is having good results with a different voice recognition software, does not mean that the School District denied Student FAPE either in recommending Windows XP in the first place, or in not following up with Dragon Naturally Speaking after Student indicated a preference for keyboarding. (N.T. 25-26, 247, 665, 703, 707, 729-730, 976, 1146, 1185; P15) The School District's voice recognition software

recommendations were designed to result in meaningful educational benefit based upon the information available to the School District at the time.

I do, however, agree with Student's Parent, and I disagree with the School District, regarding their differing positions concerning the provision of FAPE during the 2006-2007 and 2007-2008 school years. During the 2007-2008 school year, Student's Parent did, indeed, complain repeatedly (albeit inartfully) regarding Student's need for full-time aide assistance. (SD16, p.1; 542-543) While it may have been tempting to discount Parent's voluminous, confusing and exaggerated complaints, the School District's unilateral decision to continue to "wean" Student's 1:1 aide until March 19, 2008 was an inappropriate exercise of its power and disregarded the principles of due process. (N.T. 460, 514, 579, 1132, 1146-1147, 1149; SD28)

Further, while Parent's description of School District behavior as "a continuing, secretive and deceitful plan to falsely report" Student's progress is an example of Parent's exaggerations, I do find that the School District's 2007-2008 progress monitoring was so meaningless as to constitute a denial of FAPE. In January 2008, the School District School reported that Student had mastered the IEP goals, and was on track to graduate in June 2008. (N.T. 547-548, 945, 953; SD41, p.1; P23)⁴ The learning support teacher unilaterally reinterpreted Student's alertness goal (to be awake and alert 100% of the time) as meaning that Student will master this goal if Student's sleeping or non-alertness during class does not impact Student's grades. (N.T. 623-626, 1038-1039, 1041; SD7; P20; P21,p.21; SD41,pp.4,5) The learning support teacher also unilaterally reinterpreted the IEP writing goal of achieving 3 of 4 on a writing rubric, or showing

⁴ The School District cannot explain why subsequent IEPs do not also indicate mastery of the same goals. (P23; N.T. 1299)

proficiency, as meaning that Student will master this goal if Student achieves an overall 75% grade in the class. (SD41, p.1; N.T. 1002) Clearly, the IEPs' 100% alertness goals were not contingent upon Student's grades, and it was inappropriately creative to assume that a 75% class grade automatically meant that Student's writing must have met the 3 out of 4 writing rubric goal. Such unilateral goal reinterpretations, as well as the resulting inconsistent progress monitoring (mastery in one quarter which was not repeated and could not be explained later) denied Student FAPE.

Furthermore, the 2006-2007 and 2007-2008 IEPs failed to provide FAPE to Student because they contained inappropriate transition plans. The School District argues that Student has progressed, while Student argues that Student has regressed, with regard to such behavior issues as crying, sleeping in class, spending extensive time in the nurse's office, and writing down class assignments. Citing In Re the Whitehall-Coplay School District, Special Education Appeal No. 1262 (2002), the School District contends that it appropriately met repeatedly to discuss the skills that Student needed to succeed in college, and the School District contends that Student's excellent grades and qualification to graduate high school demonstrates that the School District met Student's needs. In Whitehall-Coplay, however, the School District was found not to have developed appropriate transition plans because simple career direction inventories, guidance counselor assistance in researching college programs for students with disabilities, and making connections with OVR did not meet regulatory requirements.

The Whitehall-Coplay, case offers some guidance regarding what appropriate transition plans should look like. They must identify Student's expected post-secondary environments, measure Student's current abilities against them, and then develop a

coordinated set of activities, services and experiences designed to narrow the gap between Student's current functioning and the demands of the chosen environments. They must indicate how Student will learn the necessary skills, what adaptations and compensatory methods might be useful, and how Student can obtain those adaptations. This includes consideration of Student's level of independent living skills, whether Student will need to or can survive dormitory life, and how or whether Student can compensate for any deficits. Finally, all activities must be coordinated.

The facts that Student met with the high school guidance counselor on various occasions, was assisted in applying for OVR post-graduation services and visited three colleges and attended a transition workshop does not mean that Student's transition plan was a coordinated set of activities that complied with the regulations. (N.T. 125-126, 531, 562-563, 961, 1090-1091, 1096-1097, 1107, 1166; SD20; SD37) The parties have never had a clear, mutual understanding of either the skills that Student will require for college success or the disability-based services that will be available to Student in college. They have relied on anecdotes regarding Student's grooming habits or social activities to prove generally either that Student does, or does not, require a 1:1 aide in college classes. (N.T. 24, 105, 118-119, 252, 339-340, 344-345, 372, 389, 940-944, 1064) They have relied upon assumptions, apparently based upon their own personal college experiences, regarding the general requirements of college classes, as well as the availability of disability-related services at colleges. (N.T. 198, 270, 275-276, 288, 297, 569-570, 586, 955, 963, 966, 1123, 1167, 1193-1194, 1196, 1225, 1229) They have expended considerable time and effort counting, debating, and interpreting Student's visits to the

nurse's office without directly and systematically addressing them in Student's transition plans. (N.T. 407, 911, 940, 977)

Thus, the School District has denied Student FAPE by failing to address more systematically and directly the disputes regarding the 1:1 in class and the nurse visits, by providing meaningless progress monitoring in 2007-2008, and by failing to develop a comprehensive and coordinated set of activities designed to understand more precisely what global skills Student will need in college, what services will and will not be available to Student in college, and how Student will either acquire the necessary skills or find accommodations for them in college. Accordingly, I will order compensatory education.

COMPENSATORY EDUCATION

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 s/he should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 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 s/he has progressed appropriately despite having been denied a FAPE.

Compensatory transition services cannot include post-secondary tuition. In Re Lower Merion School District, Special Education Appeal No. 1644 (2005) The compensatory education must be the type of educational and related services that are part of elementary and secondary school education offered by the State. Letter to Riffel, 34 IDELR 292 (OSEP 2000) It has been appropriate, however, to award services that help prepare a student for post-secondary endeavors by (1) designating a person experienced in transition services to provide monthly services to a student even after s/he exits the school district; and (2) providing a student with one-to-one tutoring that focuses on skills needed for success in post-secondary activities even after s/he exits the school district. In Re Troy Area School District, Special Education Appeal No. 1857 (2007)

Student's parent believes that this requires the School District to pay community college tuition for one year; pay for a full time 1:1 aide who is independent of School District authority; and fund assistive technology that is deemed necessary by an independent OT, to include Dragon Naturally Speaking voice recognition software, writing skills software, and a PDA palm pilot to record assignments and help with organizational deficits.

I conclude that, under either the M.C. or B.C. standards, the appropriate compensatory education services for the School District's failure to provide FAPE to Student are: 72 hours (the equivalent of 1 hour per week, for 72 weeks) of transition-coordination services from a person, not employed by the School District, who is experienced in transition services that help prepare students for post-secondary education;

and 72 hours (the equivalent of 1 hour per week, for 72 weeks) of one-to-one tutoring that focuses on skills needed for success in post-secondary education.

CONCLUSION

The School District denied FAPE to Student during the 2006-2007 and 2007-2008 school years when it failed to provide appropriate transition plans for those school years. These FAPE denials were compounded by the School District's failure to address directly Parent's complaints regarding the 1:1 aide until March 2008, as well as its meaningless 2007-2008 progress monitoring. The School District's proposed 2008-2009 IEP is inappropriate because it lacks an appropriate transition plan. Thus, I will award compensatory education and order the IEP team to develop an appropriate transition plan.

ORDER

- The School District shall provide to Student compensatory education in the form of:
 - 72 hours of transition-coordination services from a person, not employed by the School District, who is experienced in transition services that help prepare students for post-secondary education; and
 - 72 hours of one-to-one tutoring that focuses on skills needed for success in post-secondary education.

- The School District shall reconvene Student's IEP team to develop an appropriate transition plan that:
 - Identifies the environment(s) in which Student is likely to attend college;
 - Identifies with as much certainty as possible the demands, including independent living skills, of those environments;
 - Measures Student's current abilities against the demands of those environments; and
 - Lists a coordinated set of activities, services and experiences designed to narrow the gap between Student's current functioning and the demands of the chosen environments.

Daniel J. Myers
HEARING OFFICER

September 6, 2008