

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: BC

Date of Birth: XX/XX/XX

Date of Hearing: November 3, 2008

CLOSED HEARING

ODR No. 9233/08-09 AS

Parties to the Hearing:

Parent:

School District:
Dr. Michael Dunsmore
Palmyra Area School District
1125 Park Drive
Palmyra, PA 17078

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

School District Attorney:
William J. Zee III, Esq.
Hartman, Underhill & Brubaker
221 E. Chestnut Street
Lancaster, PA 17602-2782

November 8, 2008

November 14, 2008

Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student)¹ is a teen-age middle school student with multiple disabilities, including mental retardation, spina bifida, occasional seizures, and speech/language impairment. Student's parent contests the School District's proposed individual education program (IEP) for the 2008-2009 school year. Student's parent did not attend the due process hearing and, consequently, did not produce evidence regarding the issues raised in the due process hearing complaint. As discussed below, I conclude that Student's parent failed to meet the applicable burden of proof on all issues except one. On that single issue, I conclude that the School District was required, but failed, to offer a transition plan.

ISSUES

- Whether the School District failed to comply with an August 3, 2007 settlement agreement?
- Whether the School District has offered special education services in the least restrictive environment appropriate (LRE)?
- Whether Student needs, and the School District has not offered:
 - Assistive technology?
 - One hour daily 1:1 reading tutoring during school hours?

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

- 30-60 minutes per week of occupational therapy, speech therapy, and physical therapy?
- Use of the SRA reading program?
- Whether the School District has offered a transition plan?

FINDINGS OF FACT

1. Student, whose date of birth is XX/XX/XX, is a teen-age middle school student with multiple disabilities, including mental retardation, spina bifida, occasional seizures, and speech/language impairment. (SD1, p.1) ² Student's cognitive functioning, as measured in May 2007, was in the mentally deficient range (full scale IQ of 40), and academic functioning was in the extremely low range (1st percentile) in reading, math and written language. (SD21,pp.5-7)
2. On May 15, 2007, prior to Student's transition from elementary school to middle school, the School District issued a proposed IEP and Notices of Recommended Educational Placement (NOREPs) for both extended school year (ESY) services and the upcoming 2007-2008 school year program and placement. (SD8; SD12; SD13) Student's parent accepted the ESY proposal but rejected the proposed program and placement for the upcoming 2007-2008 school year. (SD4; SD5; SD12,p.2; SD13,p.2)
3. On August 3, 2007, the parties settled, during a due process hearing, their dispute regarding the School District's May 15, 2007 proposed IEP. (SD45, pp.30-32)
4. On May 27, 2008, the School District proposed an ESY program for summer 2008 as well as a program and placement for the 2008-2009 school year. (SD7)

² References to SD and HO are to the School District and Hearing Officer Exhibits, respectively. References to N.T. are to the transcript of the November 3, 2008 hearing.

Over the summer, the parties unsuccessfully attempted to resolve their disputes through mediation. (SD3; SD9)

5. On September 17, 2008, Student's parent filed a Due Process Complaint Notice, complaining that:
 - a. The School District failed to comply with the August 3, 2007 settlement agreement;
 - b. The School District has not offered special education services in the least restrictive environment appropriate (LRE);
 - c. The School District has not offered a transition plan;
 - d. Student needs, but the School District has not offered, assistive technology;
 - e. Student needs, but the School District has not offered, one hour daily 1:1 reading tutoring during school hours;
 - f. Student needs, but the School District has not offered, 30-60 minutes per week of occupational therapy, speech therapy, and physical therapy; and
 - g. Student needs, but the School District has not offered, use of the SRA reading program. (SD1, pp.2-3)
6. On October 1, 2008, the School District proposed a new IEP. (SD6)
7. On October 24, 2008, Student's lawyer informed me via letter, with a copy sent to opposing counsel and to Student's parent, stating that Student's counsel was withdrawing as counsel and would not be representing Student and Student's parent at the upcoming 3, 2008 Due Process Hearing. (HO2; N.T. 7)

8. On Sunday, November 2, 2008, Student's parent left a telephone message for the School District's Supervisor of Special Education, stating that Student's parent was not represented by an attorney and did not intend to appear for the due process hearing. (N.T. 6-7)
9. On November 3, 2008, I arrived at the due process hearing and was informed by the School District of the parent's telephone message. (N.T. 6) At the time that the hearing was scheduled to start, I telephoned Student's parent and left a voice message stating that I intended to conduct the due process hearing as scheduled. (N.T. 7) I also recited my cell phone number and asked the parent to call me. Finally, before beginning the hearing, I waited 10 minutes in case Student's parent either called or arrived at the hearing itself. (N.T. 7)
10. Neither party explicitly asked me for a continuance of the due process hearing. (N.T. 14) To the extent that the parent's telephone message to the School District might be considered a request to me that I postpone the hearing, that request is denied. (N.T. 14) It is unreasonable to request a continuance the Sunday before a Monday hearing, particularly where Student's parent was aware at least a week before the hearing of the attorney's withdrawal of representation. (N.T. 14; HO2) Further, a lack of legal representation is not a per se basis for continuance, because students and parents are not required to be represented by counsel in special education due process hearings.
11. At the November 3, 2008 due process hearing, School District exhibits SD1-SD46 were admitted into the record. (N.T. 14) Hearing Officer Exhibits HO1 and HO2 also were admitted into the record. (N.T. 14)

12. On the afternoon of November 3, 2008, after the due process hearing had concluded and after I had left the hearing location, Student's parent called me, stating that she had informed the School District of her intention not to attend the hearing because she was not represented by an attorney. I informed Student's parent that I had already denied any constructive request for a continuance and I had already conducted the due process hearing. I also informed Student's parent that appeal procedures would be enclosed with my written decision.
13. Student's parent received a copy of exhibits SD1 through SD45 in advance of the hearing. (N.T. 13; SD46) With this decision, Student's parent will receive a copy of exhibits SD46, HO1 and HO2.

DISCUSSION AND CONCLUSIONS OF LAW

Student's parent failed to meet the applicable burden of persuasion on all issues except the transition plan.

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 a Student in 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 a preponderance of the evidence

(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 a preponderance of the evidence.

A due process hearing can go forward even when a parent (or her attorney) chooses not to participate, and a parent's absence per se does not invalidate the resulting decision or provide a basis for appeal. In Re a Student in the Sto-Rox School District, Special Education Opinion No. 1487 (2004) Following ample and legally sufficient notice, a parent who does not attend the due process hearing cannot complain of the evidence and testimony entered into the record. In Re a Student in the Cheltenham Township School District, Special Education Opinion No. 1890 (2008)

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all students who qualify for special education services. 20 U.S.C. § 1412 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)

In this case, Student's parent did not appear at the due process hearing. (N.T. 7) Consequently, the record in this case does not contain any evidence supporting the allegations of Student's parent regarding: alleged non-compliance with the settlement agreement; LRE; assistive technology; tutoring during school hours; occupational therapy, speech therapy, and physical therapy; and SRA. Because the record lacks any evidence supporting Student's parent's allegations, I must conclude that Student's parent has failed to meet the burden of persuasion on these issues.

Accordingly, I hold that the School District has not denied FAPE to Student with regard to: 1) alleged noncompliance with the settlement agreement; 2) alleged failure to offer special education services in the LRE; and 3) Student's alleged need for, and the School District's alleged failure to offer, assistive technology, daily reading tutoring during school hours, occupational therapy, speech therapy, and physical therapy, and the SRA reading program.

**Student's parent met the applicable burden of
persuasion regarding the transition plan.**

Student's parent also complains that the School District failed to offer a transition plan. At age 14, a special education student's IEP must include a transition plan that includes appropriate measurable postsecondary goals related to training, education, employment, and, when appropriate, independent living skills. 22 Pa. Code §14.131(a)(5) "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)

On this issue, it was not necessary for Student's parent to appear at the due process hearing and/or produce evidence. I can look at the School District's proposed

IEP that is at issue in this case³ and see that it does not contain a transition plan. (SD7, p.10) Thus, even though Student's parent did not appear and did not introduce any evidence at the due process hearing, the evidence already in the record factually supports this particular allegation of Student's parent. Accordingly, I hold that the School District failed to offer a transition plan. As the remedy for this FAPE denial, I shall order the IEP team to develop a transition plan for Student.

CONCLUSION

Because Student's parent did not attend the due process hearing, she failed to meet the applicable burden of proof on all issues except one. On that single issue, I conclude that the School District failed to offer a required transition plan. Accordingly, I will order Student's IEP team to develop a transition plan.

³ The proposed IEP at issue in this case is the May 27, 2008 document. (SD7) While the record also contains an updated, October 2008 proposed IEP (SD6), that proposed IEP cannot be at issue in this case because it is not the subject of Student's September 17, 2008 due process hearing complaint. (SD1) In addition, even the later, October 2008 proposed IEP lacks a transition plan. (SD6, p.8)

ORDER

- Student's parent failed to establish that the School District failed to comply with an August 3, 2007 settlement agreement.
- Student's parent failed to establish that the School District did not offer special education services in the least restrictive environment appropriate.
- Student's parent failed to establish that Student needs, and the School District did not offer, the following services:
 - Assistive technology;
 - One hour daily 1:1 reading tutoring during school hours;
 - 30-60 minutes per week of occupational therapy, speech therapy, and physical therapy; and
 - Use of the SRA reading program.
- The School District failed to offer Student a transition plan.
- The School District shall convene the IEP team by December 1, 2008, for the purpose of developing Student's transition plan.

Daniel J. Myers

HEARING OFFICER

November 14, 2008