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SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT :
OF J.H., A STUDENT IN THE : SPECIAL EDUCATION
EXETER TOWNSHIP SCHOOL DISTRICT : OPINION NUMBER 1651

BEFORE APPEALS PANEL OFFICERS SALVIA, SKIDMORE AND GONICK
OPINION BY GONICK

BACKGROUND

Student is a 7-year-old first grade student who resides and attends school in the Exeter Township School District (District). The parties agree that Student is a student with speech-language impairment (NT 489; SD-8, SD-17, SD-20). There is disagreement between the parents and District over whether Student should be identified as a child with other health impairment (OHI) due to anxiety disorder or with autism (NT 505; SD-42). The parties do not dispute that Student is eligible for learning support, speech-language therapy (S/L) and occupational therapy (OT); they do differ about the nature, intensity and location of the educational program Student requires (NT 271-275, 360-363, 413-428, 512-514; SD-43).

Student was referred for intermediate unit (IU) early intervention services at age 3 due to concerns about speech needs (SD-21). Over the ensuing three school years (2001/2, 2002/3, 2003/4), Student was provided with special education and related services designed to address needs in speech, fine and gross motor skills, social skills, play skills, self-help skills and pre-academic skills (SD-20, SD-21, SD-42). In February, 2004, the IU referred Student for multidisciplinary evaluation (MDE) by the District in anticipation that Student would transition to kindergarten for the 2004-2005 school year (NT 30; SD-1). OT and autism/pervasive developmental disorder evaluations were completed in March, 2004 (SD-1, SD-4, SD-5, SD-6), parental input was provided (SD-1), and the District, on May 3, 2004, issued an evaluation report (ER) concluding that Student was a child with autism in a residual state who should

receive S/L and OT services in a closed classroom setting (NT 29; SD-8). The individualized education program (IEP) team met on June 1, 2004, and an IEP offering learning support with academic, S/L and OT goals was developed (NT 231; SD-9).

Curriculum based assessments were conducted by the learning support teacher at the beginning of kindergarten, and these assessments revealed that Student already was at or above the kindergarten curriculum (NT 231-239; SD-11). Faced with this knowledge, the District decided to schedule a meeting of the IEP team (NT 238; SD-12, p. 1). The team met on September 15, 2004, and again on October 15, 2004, and the academic goals in the June, 2004 IEP were deleted (NT 238, 240; SD-12, SD-15). The IEP team also concluded that Student did not need to be in the full-day kindergarten program, and Student was shifted to the regular (half-day) kindergarten class and provided with itinerant learning support, S/L or OT after the regular class was over for the day (NT 241-242). Although the parents were concerned that the proposed IEP did not adequately address Student's needs, they reluctantly followed their advocate's advice and approved the notice of recommended educational placement (NOREP), on October 25, 2004. They did so because the District agreed to provide transportation and to discuss in March, 2005 Student's possible return to full-day kindergarten in April to help with transition to first grade (NT 477-479, 483-484; SD-17).

On the same day they approved the NOREP, the parents requested an independent psychoeducational evaluation (IEE) at public expense (NT 484; SD-18). The District agreed to pay for the IEE (NT 485; SD-19). The evaluation was completed during January, 2005, and a written report was provided to the District (NT 37, 177; SD-20). Following receipt of the IEE and a meeting of the multidisciplinary team, the District, on February 8, 2005, issued an ER incorporating information from the IEE, and from Student's parents, teachers and related service providers (NT 36-58; SD-21, SD-22, SD-23). The IEP team convened on February 28, 2005, and a new IEP was developed (NT 243-258; SD-24). The parents were not satisfied with the educational program offered by the District; on March 9, 2005, they disapproved the NOREP and requested a due process hearing (SD-25).

During the period between the parents' due process request and the first session of the hearing on May 25, 2005, two psychiatric evaluations of Student were obtained and an independent auditory-language processing evaluation was completed (NT 495-500; SD-38, SD-39, SD-40). On May 28, 2005,

the District issued an ER that included information from these evaluations; from additional ability, achievement and current classroom based assessments; and from Student's teachers and therapists (NT 441-447, 500-501; SD-42). Ten days later, the IEP team reconvened, the District's ER was reviewed, and a new IEP was drafted (NT 268-275, 303-304, 413, 447-447, 504-507; SD-43). The parents rejected the proposed IEP (NT 275, 507).

The due process hearing resumed June 23, 2005, and concluded July 26, 2005, after four sessions. The issues at the hearing were whether the 2004-2005 school year IEPs provided a free appropriate public education (FAPE), whether the IEP proposed for the 2005-2006 school year was appropriate, and whether Student was entitled to compensatory education (NT 22-25). The hearing officer held that all of the challenged IEPs were appropriate, that the neighborhood school placement proposed for Student for 2005-2006 was appropriate, and that Student was not entitled to compensatory education. The parents filed exceptions to the decision and order of the hearing officer. The District filed an answer asserting that the decision and order should be affirmed in all respects.

For the reasons that follow, the Panel reverses the decision and order of the hearing officer.

DISCUSSION

Decisions of hearing officers on questions of law are subject to *de novo* review. R. H., Spec. Educ. Opin. No. 679 (1995). The appeals panel is required to defer to the fact findings of hearing officers only on matters of credibility "unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3d Cir. 1995).

The Individuals With Disabilities Education Act (IDEA) requires that states receiving federal funds for education must provide every disabled child with a free appropriate public education (FAPE). This entitlement is delivered by way of the IEP, a detailed written statement arrived at by the IEP team which summarizes the child's abilities, outlines goals for the child's education, and specifies the services the child will receive. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993). School districts are not required to provide the optimal level of services. Carlisle Area School District v. Scott P., supra. However, a program that confers only trivial or minimal

benefit is not appropriate. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988). The appropriateness of the IEP is judged based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993). The IEPs for a child with a disability must include present levels of educational performance, measurable annual goals and short term instructional objectives, appropriate objective criteria by which it may be determined on at least an annual basis whether short term objectives are being achieved, and specially designed instruction that will be provided to meet the unique needs that result from the child's disability. 34 CFR § 300.347. A school district bears the burden of proving the appropriateness of the program it has proposed.

IEPs-FAPE/Compensatory Education

The parents challenge the appropriateness of the IEPs that were in effect or proposed for the 2004-2005 school year (SD-9, SD-12, SD-15, SD-24), and the IEP offered for 2005-2006 (SD-43). The Panel has reviewed the IEPs at issue and we conclude that each is deficient for its failure to adequately address Student's demonstrated need for specially designed instruction (SDI) in writing and written work organization (NT 210-211, 215-217; SD-20, pp. 24 and 30, P-53). Moreover, the IEPs in place during the 2004-2005 school year (SD-9, SD-12, SD-15) did not include any measurable annual goals or short term objectives in written expression. Additionally, while the IEPs proposed in February and June, 2005 (SD-24, SD-43) did add one goal each for written expression, the present education levels (PELs) for writing were not objective and, therefore, the goals flowing from those PELs did not enable one to determine what Student was expected to accomplish in one year's time (see e.g., SD-43, p. 10: Student "will increase skills in written expression by scoring at least 44% on a writing rubric and/or score at a level 6 (transitional) on a developmental writing continuum..."). The February and June, 2005 IEPs continued to lack the SDI (i.e., direct, systematic instruction in content generation, fluency, grammar and mechanics) needed by Student in written expression (NT 215-217, 413-414).

The District's failure to provide an appropriate program of special education in written expression deprived Student of FAPE. The District is liable for compensatory education from the date it knew or should have known that Student was so entitled, excluding the time reasonably required for the District to rectify the problem. M.C. v. Central Regional

School District, 81 F.3d 389 (3d Cir. 1996). The Panel has reviewed carefully the comprehensive record in this case. We conclude that the District knew or should have known of Student's needs in writing and written work organization no later than the date it received the IEE, in January, 2005 (NT 37), and that an appropriate program to address these needs ought to have been in place by the time of the February 28, 2005 IEP meeting. Based upon the un rebutted testimony in the record (NT 216), the Panel awards compensatory education in the amount of 1-1/2 hours per day for each day Student attended school from March 1, 2005, until the date of this opinion and order. Any compensatory education claims with respect to periods following the date of this opinion and order may be pursued in a separate due process hearing, if necessary.

The parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the goals of Student's pendent or future IEPs. Such hours must be in addition to Student's then current IEP and may not be used to supplant such services. These services may occur after school hours, on weekends and during the summer months, when convenient for Student and Student's parents.

Placement

The parents next contend that the hearing officer erred when she held that the placement proposed by the District for the 2005-2006 school year was appropriate. The District recommended that Student attend first grade in Student's neighborhood school (NT 359-363), a facility containing "open" classrooms (NT 350-358, 370-374; SD-48). The hearing officer found that placement in an open school was appropriate.

We find substantial evidence in the record that contradicts the hearing officer's holding. In May, 2004, the District completed an ER that noted Student was sensitive to sound and touch and would respond best to education in a closed classroom (SD-8). This evaluation was issued 1-1/2 months after a developmental pediatrician at [redacted] Hospital found that a small classroom with a relatively low noise level was necessary due to Student's sound sensitivity (SD-4). Following the issuance of the District's May, 2004 ER, other independent evaluations identified Student's difficulties with attention to verbal input and with processing spoken language in noisy environments and recommended that instruction be provided in a quieter room with less background noise and fewer distractions

(NT 220; SD-20, SD-39). Testimony at the due process hearing also revealed that Student does exhibit difficulties with sound sensitivity and noise even at the closed school attended during kindergarten (NT 43, 225). Lastly, there was substantial evidence at the hearing showing that Student was more likely to be distracted during instructional time at the open school proposed as the placement for first grade than would be the case in the closed classrooms in the building where Student was enrolled for kindergarten (NT 370-377, 382-384, 391-392, 510-512). This evidence clearly outweighs testimony that is largely off point. The question is not can Student function successfully during noisy activities in homeroom, gym class and assemblies (NT 42-43, 224, 393). Rather, the issue is can Student function appropriately during academic instruction in a noisy environment?

A preponderance of the evidence in this case demonstrates that the neighborhood school placement proposed for Student for 2005-2006 is not appropriate. Accordingly, the decision and order of the hearing officer approving Student's placement in that school for the 2005-2006 school year are reversed.

Dicta

The District's supervisor of special education testified at the hearing that he, and not the IEP team, has final say on the amount and nature of the related services that will be provided to an eligible student:

"A ...If the IEP team-if I wasn't present at an IEP meeting and the members of the IEP team felt that a particular service was needed, then if it was something that was, say, out of the ordinary, I might ask them for their justification, but in very few cases have I ever overridden my team and their decision process."

(NT 379-380).

"Q You have the final say in the amount of OT and speech therapy--

A As the school district's ultimate LEA and the person who is responsible for delivery of programs, I do." (NT 380-381)

Special education regulations provide that the IEP team has the responsibility and authority to determine the nature and extent of the related services, if any, that are necessary for a

disabled child. 34 CFR §§300.340-300.347. If the District is allowing IEP team decision-making to be subverted by its LEAs, it should immediately cease doing so.

ORDER

Accordingly, September 30, 2005, the decision and order of the hearing officer are reversed, as follows:

1. The determination that Student was provided FAPE during all periods at issue is reversed. Student is awarded compensatory education in the amount of 1-1/2 hours per school day from March 1, 2005, to the date of this order in accordance with the opinion of the Panel.

2. The hearing officer's determination that Student's placement in the neighborhood school for 2005-2006 is appropriate is reversed for the reasons set forth in this opinion.

Those exceptions not specifically addressed in this opinion and order are dismissed.

Pursuant to 22 Pa. Code §14.162(o), the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or to the appropriate federal district court.

Jeffrey Gonick,
For the Appeals Panel

Signature and Mailing Date: September 30, 2005