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PENNSYLVANIA SPECIAL EDUCATION DUE PROCESS HEARING OFFICER

ODR File Number: 8375/07-08 AS
Student: CG
School District: Wilson School District
Type of Hearing: Open

For the Student:

Parents

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For the School District:

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Dates of Hearing: February 8 and 25, 2008
Date Record Closed: March 26, 2008
Date of Decision: March 29, 2008
Hearing Officer: Daniel J. Myers

Background

Student received an IEP in her 3rd grade school year. She argues, however, that she was in need of specially designed instruction for her previous two school years. In this case, she seeks compensatory education for denial of a free and appropriate public education (FAPE) for her 1st and 2nd grade school years. She also requests reimbursement of the costs of private OT services obtained during that period. For the reasons described below, I find for the School District.

Issues

- Whether or not the School District has denied a free and appropriate public education to Student for the 2005-2006 and 2006-2007 school years, entitling Student to compensatory education; and
- Whether or not Student's parents are entitled to reimbursement of occupational therapy expenses.

Findings of Fact

1. Student, whose date of birth is xx/xx/xx, is a 3rd grade Student who currently receives special education services in language arts, math and reading, with access to a resource room and a computer-based language arts program, as well as emotional supports and a behavior management plan in the classroom. (N.T. 192, 218) She has an average range IQ, a specific learning disability (SLD) in the area of writing, an anxiety disorder, and attention deficit hyperactivity disorder (ADHD.) (N.T. 21, 259-265) She has other medical conditions as well, including sensory processing disorder, asthma, immune system deficiency of undefined origin, and gastroesophageal reflux disease (GERD), for which the record in this

- case contains either no medical diagnoses or no dispute between the parties. (N.T. 21)
2. During the 2004-2005 school year, Student attended the School District's kindergarten. While she was chronologically young in comparison to her classmates, both parties agree that Student was successful. She enjoyed going to school, made friends, experienced minor peer interaction trouble, appeared slightly behind in reading, more so in writing, but demonstrated academic progress throughout the year. (N.T. 21-22, 25, 180, 275-277; SD1) Although the record does not indicate why the School District was considering a transfer of Student to a different elementary school during her kindergarten year, the parties agreed to keep Student at her current elementary school rather than transfer her. (P24, pp.1-2, 10; N.T. 25, 27, 38, 105)
 3. During the 2005-2006 school year, i.e., Student's 1st grade year, Student received Title I instruction and her teacher recommended Student for the regular education reading recovery program, after which Student demonstrated an entire year's growth in reading in half a year. (N.T. 26, 46, 278-279; SD2) In October 2005, however, Student's parent took Student to a private psychiatrist in response to Student's expressions of frustration and hatred for school. (N.T. 29-30, 99, 115-116, 161; P14) Both Student and her parent received private counseling from a licensed clinical social worker in the psychiatrist's office. (N.T. 30, 96; P14) With respect to Student, the social worker monitored Student's need for medication, helped manage Student's anxiety, increased Student's social activities, and improved her social skills. With respect to Student's parent, the

- social worker offered parent management strategies and worked on the parent's persistent lack of trust and difficulties accurately perceiving social situations. (N.T. 105, 159, 164)
4. Over Student's 1st grade mid-winter holidays, her teacher died and her grandfather was injured in a motorcycle accident. (N.T. 26, 40) Neither Student nor her parent responded well to the replacement 1st grade teacher. Student's parent considered the replacement teacher to be punitive and excessively negative. (N.T. 30-31, 35, 214; P24, pp.9, 11, 13, 14-15)
 5. On February 23, 2006, Student's parent requested a multidisciplinary evaluation as well as a Section 504 plan. (SD5; SD6; P24, p.3; N.T. 28) On March 10, 2006, the School District asked Student's parent to identify what Section 504 needs student had. (P24, p.6) Due to worsening asthma, Student was absent for 11.5 days in the second half of the school year. (N.T. 42; P39, p.1)
 6. Also in spring 2006, the School District again was considering transferring Student to a different elementary school. Student's private social worker and psychiatrist wrote letters expressing their concerns about how a transfer of Student to a new elementary school might affect her interpersonal relationships and anxiety. (P13; P14; P24, p.2; N.T. 27, 138)
 7. Despite an April 2006 email in which the School District's Director of Special Education assured Student's parent that the evaluation report (ER) would be completed by June 8, 2006 and that the multidisciplinary team meeting process would be concluded no later than the middle of August (P24, pp.7-8), the School District issued its ER on September 9, 2006, after Student started her 2nd grade

- school year. (N.T. 44, 257; P16; SD10) The ER found that Student demonstrated average range scores in tests of cognitive ability, executive functioning, and academic achievement. School-based behavior rating scale results were average, except elevated ratings indicating mild social difficulties at school. Home-based ratings, by contrast, were quite elevated, consistently falling between at-risk and clinically-significant ranges in most areas. (SD10, p.14; P16, p.14) Finding no significant discrepancy between cognitive ability and achievement, no deficits in any cognitive processing abilities indicative of a specific learning disability, and positive response to the 1st grade Reading Recovery intervention, the ER concluded that Student did not have a SLD. (SD10, p.15; P16, p.15) The ER also noted that, while Student's ADHD, anxiety, and other reported health issues qualified as other health impairments (OHI), they did not appear to adversely affect her educational performance. (SD10, p.15; P16, p.15)
8. Student's parent questioned the ER's validity, noting that the evaluation occurred during the summer without typical classroom stresses and distractions, that Student tested below level in reading upon her 2nd grade return to school, and that teacher reports in the ER of Student's behavior did not match 1st grade teacher reports in home-school log books. (SD10, p.19; P17; N.T. 45) Although Student was reading on-grade level at the end of 1st grade, Student's parent considered this inadequate, as having "barely made reading level...she had just made it into the final reading level they wanted her to complete before going to second grade." (N.T. 46)

9. By October 2006 Student had begun complaining to her parent and private social worker about peer conflicts, that her teacher did not like her, that she was frequently in trouble for a messy desk and not understanding her work, and that she was required to miss recess because she was not keeping up in school. (N.T. 48, 69, 73, 117; P38, p.14) On November 16, 2006, at a meeting to discuss their disagreement over whether Student needed a Section 504 plan, the parties agreed to an occupational therapy (OT) evaluation. (P25, p.6; SD12, p.1; N.T. 52-53) The resulting January 17, 2007 OT evaluation recommended quarterly consultative OT services, but no direct OT services. (SD15; P19; P26, p.28; N.T. 81, 223, 228)
10. Student's parent became increasingly dissatisfied with Student's 2nd grade teacher over the school year. Around December 2006, Student was observed by her parent, her teacher, and her private social worker to have obviously self-cut hair, although no one knew when, where or why Student had cut her hair. (N.T. 184, 374-375, 402-403) Student's parent was convinced that Student had cut both her hair and her clothes at school, and that such behavior was in response to school-related stresses. (N.T. 57-58, 71, 73; P25, pp.6, 7; P26, p.16) Student's parent also was convinced that Student's teacher occasionally screamed and yelled at Student, and regularly forced Student to lose recess as punishment for missed class work. (P26, pp.2-3, 33, 61-62; N.T. 211) When Student's second grade teacher refrained from hugging Student in the hallway, reminding Student of "the rules," Student's parent interpreted this both as personal rejection of Student and as yelling and screaming at Student. (N.T. 211-212) When Student was named

- classroom Star of the Week in May 2007, Student's parent considered this to be an intentional slight because it did not occur until the end of the school year. (P26, pp.35, 37) Ultimately, Student was absent 30.5 days during 2nd grade, with twice as many absences during the second half of the school year. (N.T. 283; SD22, p.1)
11. Student's 2nd grade teacher is certified in both elementary education and special education. (N.T. 351) She is a very enthusiastic teacher who can get loud with an occasional "woo-hoo" or "can you hear me?" (N.T. 418, 427) She characterized Student's behaviors as "midline" in comparison to her peers. She used a grade-appropriate green, yellow, red behavior program for her classroom similar to that used in Student's 1st grade. (N.T. 344-345) She noted that Student remained inside during recess to complete work at the same rate as other students in the class. (SD18; N.T. 231, 370-372) Student's teacher gave Student break cards so that Student could receive breaks when Student felt they were necessary, and Student' teacher assisted Student in using a sensory modulation kit (fidget kit) to address any sensory processing needs. (N.T. 399)
12. I conclude that Student's teacher did not yell and scream at Student, and I find the testimony of Student's teacher on this point more credible than parent's. More specifically, the teacher is an experienced, certified elementary and special education teacher who is a very enthusiastic teacher, and who can get loud with an occasional "woo-hoo" or "can you hear me?" (N.T. 418, 427) Her demeanor at hearing was professional and consistent with what I would expect of an enthusiastic teacher of young children, while the parent's testimony overall indicates a parental propensity to exaggerate slights and to jump to negative

- conclusions without sufficient facts. (See also private social worker's testimony at N.T. 105, 159, 164)
13. On April 27, 2007 the School District issued two documents: a) a NOREP stating that Student is not eligible for services under SLD or OHI (P3); and b) a request for parental permission to evaluate whether Student was eligible for special education services as a child with emotional disturbance (ED). (P2; SD21) Student's parent rejected the NOREP, refused the evaluation request and requested a due process hearing, asserting that Student's behavior was based upon her OHI, not ED. (P3, p.2; P26, p.30; N.T. 83, 85)
14. On May 7, 2007, the School District issued a NOREP refusing to conduct further meetings with Student's parents to resolve their continued dissatisfaction. (P 4; SD20; N.T. 198, 233) On May 8, 2007, Student's parent obtained a private OT evaluation recommending one hour per week of direct OT services. (P20; N.T. 86-87) Student's parents subsequently paid \$2,249.04 for private OT services. (N.T. 87, 194; P49)
15. On June 12, 2007 a due process complaint notice was filed with ODR. (P5) At a June 27, 2007 resolution meeting, the parties agreed to evaluate Student to determine her eligibility for special education services without listing a particular category of suspected disability. (N.T. 188, 191; P8) The parties have subsequently agreed that Student is eligible for special education services and developed a November 2007 IEP based upon more pronounced attention problems than in the past, as well as a SLD in writing. (SD25; N.T. 191, 226-227,

- 233, 287) There is no issue in this case regarding Student's 2007-2008, 3rd grade school year. (N.T. 233)
16. On December 16, 2007, Student filed the request for due process at issue in this case. (P12) The parties waived a resolution meeting and I conducted hearings on February 8 and 25, 2008. Admitted into the record are SD1, SD2, SD4-SD6, SD10, SD12-SD15, SD18, SD20-SD23, SD25 and SD29, with SD23 admitted over Student's objection. (N.T. 480) Also admitted into the record are P2-P5, P8-P10, P12-P14, P16, P17, P19, P20, P23-P27, P37-P39, P42, P44, P47, P49-P51, P54 and P64. (N.T. 481; School District written closing argument at 1)
17. At the conclusion of the February 25 hearing, the parties agreed that any Parent exhibit that was not referenced by a witness, except P29 and P64, would not be admitted into the record. (N.T. 481) The parties did not, at that time, explicitly list which Parent exhibits were, and were not, referenced by a witness, and I simply expected both parties to list such exhibits in their written closing arguments on March 19, 2008. (N.T. 481) Although neither party explicitly referred to P12, I admit it into the record because it is the request for due process that initiated this case.
18. On March 18, 2008, I was with Student's counsel in a different due process hearing when I spontaneously asked him when the closing arguments were due in this case. When he was unsure, I called the School District's counsel to see if she could remind us quickly, but she was not in her office. I vaguely remember telling Student's counsel that I would have no problem granting the parties a week extension. On March 19, 2008, the School District's counsel filed her written

closing argument. On March 20, 2008, I received a voice message from Student's counsel, and an email from School District's counsel, both of which suggested that Student's counsel needed more time within which to file his written closing argument. The School District objected to any extension of time. On March 24, 2008, I received a fax from Student's counsel confirming that, on March 18, I had granted an extension of time until March 25, 2008 within which to submit Student's written closing argument. On March 25, 2008, I received a voice message from Student's counsel stating that his power had been disrupted and he was unable to finish Student's written closing argument until the following day. On March 26, 2008, I received Student's written closing argument by email before 9:00 a.m. While I regret that I handled the timing of the written closing arguments so casually, I deny the School District's request to strike Student's written closing argument, and I accept into the record Student's March 26, 2008 written closing argument.

Discussion

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 The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.)

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 United States Supreme Court has held that, in an administrative hearing challenging a special education IEP, 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's evidence is preponderant, or of greater weight or more convincing than the other party's evidence, then that party prevails whose evidence tips the scales.

**The School District did not deny FAPE for the 2005-2006
and 2006-2007 school years**

In reviewing Student's claim that the School District should have identified Student as an eligible child in need of special education prior to 3rd grade, I must look at the factual record with the perspective of snapshots in time, not with the perspective of hindsight. In Re Z.S. and the West Chester Area School District, Special Education Opinion No. 1748 (2006); In Re A.P. and the Oxford Area School District, Special Education Opinion No. 1744 (2006); In Re D.S. and the Council Rock School District, Special Education Opinion No. 1740 (2006) In addition, the standard to be applied to those facts is whether or not Student met the two-part definition of disability: 1) meeting

the criteria for one or more of the Act's recognized classifications, and 2) by reason thereof, needing special education. 34 CFR §300.8(a) This determination is not a bright-line, empirically precise matter, and it is sometimes a fuzzy line between regular education interventions and the need for special education. In Re J.K. and Manheim Township School District, Special Education Opinion No. 1825 (2007); In Re J.S. and Southeastern School District, Special Education Opinion No. 1804 (2007)

State regulations require initial evaluations to be completed and a copy of the evaluation report presented to the parents no later than 60 school days after the agency receives written parental consent. 20 Pa. Code §14.123(b) Federal statute requires that, in matters alleging a procedural violation, I may only find that Student did not receive FAPE if the procedural inadequacies impeded Student's right to FAPE, significantly impeded the participation opportunity of Student's parents, or caused a deprivation of educational benefits. 20 USCA §1415(f)(3)(E)(ii)

Student argues that her September 9, 2006 initial ER was not in compliance with applicable timelines because it was issued 75 school days after her February 23, 2006 request for evaluation. (P16; P24, p.3) The School District admits that its ER was late, but argues that it was only 7 days later than the 60 school day timeline. (SD closing argument, fn.1) I conclude that the procedural lateness of the ER did not impede Student's right to FAPE, did not significantly impede the participation opportunity of Student's parents, and did not cause a deprivation of educational benefits. As described below, the ER was substantively appropriate and, therefore, its delay did not impact Student's receipt of FAPE.

Substantively, ERs must assess children in all areas related to the suspected disability, and they must be sufficiently comprehensive to identify all of the child's special education and related services needs. 34 CFR §§300.304 In this case, the School District's September 9, 2006, ER assessed Student's cognitive ability, executive functioning, academic achievement, and behavior. It also noted Student's ADHD, anxiety, and other reported health issues. (S10; P16) Finding no significant discrepancy between cognitive ability and achievement, no deficits in any cognitive processing abilities indicative of a specific learning disability, and positive response to the 1st grade Reading Recovery intervention, the ER concluded that Student did not have a SLD. (S10, p.15; P16, p.15) While noting that Student's health conditions qualified as other health impairments (OHI), the ER reasonably concluded that they did not appear to adversely affect her educational performance. (S10, p.15; P16, p.15) Thus, I find no substantive denial of FAPE with respect to the September 2006 ER.

Student contends that, even before the September 2006 ER, the School District ignored Student's worsening emotional and physical condition over the 1st grade school year, delaying a Section 504 plan while Student's teacher simultaneously reported that Student was uncooperative and not focused. (P24, pp.11-15) Student argues that her ADHD and anxiety symptoms in the classroom worsened, noting that her psychiatrist emphasized in his May 1, 2006 letter that Student's anxiety was a compounding factor in her ADHD at school. (P14) Her parent testified that Student was falling further behind in her reading, having trouble understanding homework, getting it done, and missing papers. (N.T. 42-43) She complains that her report card is replete with beginning level marks, particularly in math. (SD2; P39) I disagree.

Student performance was not remarkable in terms of a reasonably suspected disability. The social worker and psychiatrist's letters appeared to be concerned with Student's building assignment rather than her need for specially designed instruction. They revealed an anxiety problem, but they did not show its adverse effect on educational performance to an extent necessitating special education. See In Re K.S. and Bethlehem Area School District, Special Education Opinion No. 1811 (2007); In Re A.P. and Oxford Area School District, Special Education Opinion No. 1744 (2006) In addition, Student's 1st grade report card indicates developmentally appropriate scores and the reasonable use of regular education interventions. It does not indicate either a worsening condition or a need for specially designed instruction. (SD2; P39)

Regarding the 2006-2007 school year, Student asserts that her stomach problems worsened soon after the school year started, and her parent alerted the School District repeatedly that Student was chewing her hair, clothes and the tops of her pencils off. (P25, p.6) Parent complained that Student's reading level dropped and she was having trouble remembering her homework. (P25, p6) Student complains that her 2nd grade teacher's heavy-handed teaching methods only exacerbated the problem. Student notes that the SD's October 2007 (3rd grade) ER finding Student eligible for special education services simply indicates that Student should have been found eligible sooner. (P9, pp.8-9) Again, I disagree.

Student's reading skills during 2006-2007 were slightly below target levels and were being addressed through regular education interventions. (SD22, pp.2-3) Her 2nd grade teacher, who was certified in both elementary education and special education (N.T. 351), characterized Student's behaviors as "midline" in comparison to her peers.

She used a grade-appropriate green, yellow, red behavior program for her classroom similar to that used in Student's 1st grade. (N.T. 344-345) She noted that Student remained inside during recess to complete work at the same rate as other students in the class. (SD18; N.T. 231, 370-372) When I review the factual record of 2006-2007 with the perspective of a snapshot in time, not with the perspective of hindsight, that record is not preponderant that the School District should have known at that time that Student was in need of specially designed instruction. Regular education interventions were still appropriate at that time.

I will, however, note that the growing misunderstanding between the parties during Student's 1st and 2nd grades was not one-sided; the School District did play a part in aggravating the conflict. At least twice, the School District intensified, and then diminished, the anxiety of Student's parents regarding the redistricting/ transferring of Student. (N.T. 21-22, 25, 27, 138, 180, 275-277; SD1; P13; P14; P24, p.2) The School District should not discount the trauma that concerned parents can feel when they perceive that they are dealing with a bureaucracy that considers their very young children to be nothing more than objects that are annually subject to apparently arbitrary building transfers. I also recognize the trust that was broken when the School District failed to comply with its explicit promise in an April 2006 email that it would complete the initial ER by June 8, 2006 and that the multidisciplinary team meeting process would be concluded no later than the middle of August 2006. (P24, pp.7-8) Finally, a NOREP announcing that the School District will no longer meet with a parent is quite unusual and does appear rather arrogant. When these School District behaviors are combined with a

parental propensity to exaggerate slights and to jump to negative conclusions, it is easy to see why these parties now find themselves in due process.

Nevertheless, the School District's May 2007 NOREP refusing to conduct further meetings with Student's parents was resolved, along with the earlier April 2007 NOREP, through a June 12, 2007 due process complaint and a June 27, 2007 resolution meeting. (P 4; P5; SD20; N.T. 198, 233) The procedural lateness of the September 2006 ER did not impede Student's right to FAPE, did not significantly impede the participation opportunity of Student's parents, and did not cause a deprivation of educational benefits. The ER was substantively appropriate and, therefore, its delay did not impact Student's receipt of FAPE. Finally, the facts in the record regarding Student's 1st and 2nd grades do not indicate that the School District should have concluded, before 3rd grade, that Student was in need of specially designed instruction. Accordingly, I conclude that the School District did not deny FAPE to Student during the 2005-2006 and 2006-2007 school years.

Student is not entitled to reimbursement of private OT costs

Student argues that because the School District failed to provide her with an IEP until November 2007, she was forced to obtain educationally-related OT services privately. Student argues that, because Student's November 2007 IEP (P11, pp.28-37), over which there is no dispute, contains recommendations made by Student's private OT, the private OT services must be considered educationally related. (Student's written closing argument, p.27) Student asks that I exercise a hearing officer's broad discretion in ordering appropriate relief by requiring the School District to reimburse her parents for the \$2,249.04 costs of private OT services.

The November 2007 IEP does not, in fact, indicate that Student's private OT services were educationally-related. The IEP's present levels of functional performance incorporate Student's private OT evaluation and refer to that evaluation's conclusion that Student's gross motor skills appear to be within functional limits. (P11, p.5) The November 2007 IEP provides quarterly OT consultations, but not direct OT services. (P11, p.16) Thus, the purported bases for Student's reimbursement request, i.e., that the November 2007 IEP contains the private OT's recommendations and indicates that the private OT services were educationally-related, are incorrect. I conclude that there is no basis in the record to support reimbursement of the private OT costs. Accordingly, the request for reimbursement is denied.

Conclusion

The procedural lateness of the ER did not impede Student's right to FAPE, did not significantly impede the participation opportunity of Student's parents, and did not cause a deprivation of educational benefits. Substantively, the ER was appropriate, reasonably concluding that Student's health impairments did not appear to adversely affect her educational performance. Further, Student performance was not remarkable in terms of a reasonably suspected disability. The social worker and psychiatrist's letters revealed an anxiety problem, but they did not show its adverse effect on educational performance to an extent necessitating special education. In addition, Student's 1st grade educational progress does not indicate either a worsening condition or a need for specially designed instruction. While Student's reading skills during 2006-2007 were slightly below target levels, they were being addressed through regular education interventions. Student's behaviors were "midline" in comparison to her peers and she

remained inside during recess to complete work at the same rate as other students in the class. When reviewed with the perspective of a snapshot in time, not with the perspective of hindsight, the record is not preponderant that the School District should have known, prior to 3rd grade, that Student was in need of specially designed instruction. Finally, there is no basis in the record to support reimbursement of the private OT costs.

Accordingly, Student's requests for compensatory education and for reimbursement of private OT costs are denied.

ORDER

- The School District did not deny a free and appropriate public education to Student for the 2005-2006 and 2006-2007 school years;
- Student is not entitled to compensatory education;
- Student's parents are not entitled to reimbursement of occupational therapy expenses.

Daniel J. Myers

Hearing Officer

March 29, 2008

ODR File Number: 8375/07-08 AS
Student: Student
School District: Wilson School District