

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.

Due Process Hearing for M.F.

Date of Birth: xx/xx/xx

ODR File Number: 6081/05-06/AS

Date of Hearing: February 7, 2006

CLOSED HEARING

Parties:

Delaware Co. IU/EI
200 Yale Ave.
Morton, PA 19070-1918

Parents

Representative:

Leo Hackett, Esq.
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Suite 301
Media, PA 19063

Pro se

Date Transcript/Exhibits Received:

February 13, 2006

Date of Closing Statements/Record
Closure:

February 28, 2006

Date of Decision:

March 15, 2006

Hearing Officer:

Joy Waters Fleming, Esq.

Background

Student, “Student”, is currently [preschool] age and receiving pre-school services through the Delaware County Intermediate Unit, “IU”. Student is eligible for and receives preschool services because he is autistic.

Issues

Is the IU’s proposed social skills program in the proffered IEP appropriate?

Is the IU’s proffered occupational therapy program appropriate?

Findings of Fact

1. Student, “Student”, is currently [preschool] age and receiving pre-school services through the County Intermediate Unit, “IU”. (IU.20)
2. Student is eligible for preschool services because of an autism spectrum disorder diagnosis. (IU.20)
3. In April 2004, Student received his first IEP through the IU. (IU-6, N.T. 103)
4. On September 24, 2004, the IEP team, agreed to the implementation of two hours of “DIR” or “relationship based” therapy to assist Student with improving his social and language skills. (IU-6, N.T. 91-92, 127)
5. Developmental individual differences relationship. “DIR” or “relationship based” methodology was pioneered by Dr. Stanley Greenspan as a method of therapy for autistic children. (N.T. 21)
6. The DIR methodology has been in use at the IU for a couple of years. (N.T. 88)

7. The Summer Institute is a training of at least one-week where participants receive in depth training in the DIR methodology as promulgated by Dr. Greenspan. (N.T. 76)
8. Several IU affiliated, occupational therapists, “ OT” ’s are in various stages of receiving training in DIR. (N.T. 70)
9. Mr. G is an IU employee, and a licensed occupational therapist with a Master’s degree in occupational therapy and the therapist proposed to work with Student. (75, 81)
10. Mr. G attended the “Summer Institute” one time and is currently part of a mentoring group in pursuit of his certification. (N.T. 75, 81)
11. The summer institute is an ongoing training which results in participants receiving certification from the DIR institute. (N.T. 76, 135)
12. During the 2004-2005 school year, Student received one hour of OT at [redacted] Center using general occupational therapies and strategies and an additional hour of OT at A Total Approach, “ATA” using a relationship based approach. (N.T. 104-106)
13. The IU selected ATA as the provider of Student’s additional OT because the it had a contract in place for the provision of services but did not have its own staff trained in that methodology. (N.T. 105-106)
14. None of the IU’s OT’s nor Student’s current OT at ATA are certified in DIR. (N.T. 76, 135)
15. In February 2005, after meeting with Parents, the IEP team amended Student’s IEP to provide a relationship based approach in one occupational therapy and one speech therapy session as well as direct teaching of social skills in a dyad with another child and the opportunity to practice those skills in a small group setting with his peers. (IU. 19, N.T. 112, 119)
16. On May 17, 2005 and again on August 19, 2005, the IEP team met to draft an IEP for Student. (IU. 20)

17. At the May IEP meeting, the IU informed Parents that it was considering providing its own relationship based approach therapies and transitioning children from ATA to their own therapists. (N.T. 110)
18. By July 15, 2005, the IU's contract with ATA was in the process of being discontinued and the children served by that provider were being transitioned to other therapists within the IU. (N.T. 96)
19. At the August 2005, IEP meeting, the IU proposed an IEP that contained seven goals designed to address Student's verbal, fine motor, attention, social and communication needs. (IU. 20)
20. In the proposed IEP, the IU proposed specialized instruction in a reverse mainstream classroom for 13.75 hours a week at the Center. (IU. 20)
21. In the proposed IEP, the IU proposed supportive intervention in the form of 1.0 hour a month of physical therapy at the Center. (I.U. 20)
22. In the proposed IEP, the IU proposed specialized instruction in the form of 1.5 hours a week of occupational therapy at the Center that would include .50 hours of small group. (IU. 20, P-7, N.T. 110)
23. In the proposed IEP, the IU proposed supplemental intervention of 1.0 hour a week of occupational therapy at a designated IU site specifically using a relationship based methodology. (IU. 20, p. 19, 20, N.T. 111)
24. In the proposed IEP, the IU proposed providing, for a six week trial period, 1.5 hours of weekly social skills instruction to Student in a small group dyad with a peer as well as an opportunity to practice skills in a small group setting. (IU. 20, p. 19, N.T. 112-113)
25. To address Parent's concerns about the transition of Student to a new therapist, the IU proposed to provide two hours a month of consultation to share methodology specific to relationship based approaches with IU staff who would be running the social skills group as well as [Center] classroom staff. (IU. 20, p.22, N.T. 114)

26. In the proposed IEP, the IU proposed specialized instruction in the form of 2.0 hours a week of speech therapy at the Center. (IU. 20)
27. In the proposed IEP, the IU proposed supplemental intervention in the form of 1.0 hours a week of speech therapy at a designated IU site. (IU. 20)
28. The specially designed instruction proposed by the IU indicated that one occupational and one speech therapy session should use relationship based approaches to building Student's social and play skills. (IU. 20, p. 19, P-7, p.21, N.T. 111)
29. Both the [Redacted] School and the [Redacted] Center are available as a location to provide occupational therapy using a relationship based approach to Student. (N.T. 61-63, 74)
30. The School is approximately a mile and a half from the Center where Student attends preschool and the School is about 14-15 miles from [Redacted]. (N.T. 239)
31. Currently, about seven other children receive OT utilizing a relationship based approach at the School. (N.T. 72)
32. Currently, three-four children receive OT utilizing a relationship based approach at the [Redacted] Center. (N.T. 84)
33. The School is a former elementary school where Student received an injury while attending an IU program. (N.T. 43)
34. In the hallway of the School, equipment including a ball pit, bikes and toys from an autistic support classroom and a Headstart program are in use. (N.T.67)
35. In the room used for OT at [School], a wall divides the fine motor area and the door can be shut. (N.T. 66)
36. The IU provides social skills programs at its [Redacted] Center, the School as well as contracting with other providers such as "Wanna Play" and "Collage" for this programming. (N.T. 42, 79-80, 239)

37. Ms. H, an occupational therapy assistant, with ATA, is seeking her certification in relationship based methodology and currently provides OT to Student. (N.T. 74, 82, 135)
38. On August 17, 2005, Parent rejected the NOREP offering the proposed program and placement as described in the IU's proffered IEP. (IU. 21, p. 3)
39. In October 2005, Student began a social skills program at ATA. (N.T. 167)
40. Student is eligible for transition to school age/kindergarten services for the 2006-2007 school year. (P-7)

Discussion and Conclusions of Law

Student was diagnosed with an autistic spectrum disorder at the age of two and half. (FF.2) He began receiving services through the IU in 2004 at the age of three. (FF. 3) Currently Student and Parents receive a full menu of specialized services including speech, occupational and physical therapy.

Since his involvement with the IU in 2004, Student has received supportive interventions from the IU that have included OT, speech and physical therapy. (FF. 3, 12) In September 2004, the team met and discussed Parents' request that Student receive DIR oriented speech or OT services as part of his educational program. (FF.4-6, 13) After that meeting, Student's IEP was revised to provide 2.0 hours of a DIR approach to help improve his social and language skills. (FF. 15)

The IDEIA requires that states provide a "free appropriate public education" "FAPE" to all students who qualify for special education services. 20 U.S.C. §1412. In Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Rowley standard is only met when a child's program provides him or her with more than a trivial or *de minimus* educational benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988). 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.

Preschool children ages three to five with developmental delays or disabilities are entitled to the same substantive and procedural rights as their eligible school aged counterparts. Additionally, under state law, an eligible young child is afforded additional protections.¹ Consistent with Shaffer v. Weast, Parents have the burden of proof in this proceeding.

In May and August of 2005 the IEP team convened to develop an IEP for Student's 2005-2006 school year (FF. 16, 17, 19) Parents rejected the NOREP accompanying the IEP and requested that a due process hearing commence with respect to issues regarding the IU's proffered program. (FF. 38)

Parents take exception to the proffered IU program on two grounds. First, they allege that the proposed IEP is inappropriate because it will sever ties with a therapist with whom their son has bonded. This bond, they assert is based on a Relationship (DIR) methodology, "relationship based" that is responsible for much of his progress and if disrupted could result in regression.² Second, Parents contend that the proffered social skills program is not an appropriate environment where their son can make progress and desire for him to remain involved in the social group at ATA, the private provider.

Occupational Therapy

In the proposed IEP, the IU has offered Parent and Student an assortment of preschool early intervention services in the form of specialized instruction, supportive and supplemental intervention, itinerant education and parent training. (FF. 20-22, 23-24, 26-28) However, Student would now receive OT services through the IU instead of with his current provider, ATA. (FF. 23) Parents rejected this proposal believing that the severing of ties with his established therapist could be detrimental to Student and

¹ 22 Pa. Code § 14.153-§ 14.155, § 14.157

potentially result in regression of any progress he has experienced. Furthermore they contend that the proposed locations for the OT programs are either too far or in an unsafe, over-stimulating environment that is unable to provide relationship based methodology consistent with their son needs. They seek a continuation of services through ATA.

For the following reasons, Parents have not established by a preponderance of the evidence that the IU has failed to offer FAPE.³ First, Parents rejected the proposed OT program at the [Redacted] Center and School on grounds that no OT's at those sites were trained in the relationship based methodology. On the contrary, the IU has established that each site has a fully capable, licensed occupational therapist, both with relationship based training. (FF. 7-11, 14, 29)

Parents contend that [Redacted] Center is too far and that the School is unsafe and over-stimulating. [School] is fifteen to sixteen miles from the Center where Student currently attends preschool. (FF. 30) That distance is not unduly burdensome and does not constitute a denial of FAPE. Although Student did sustain a minor injury at [School], Parents have offered no credible evidence that a pattern of unsafe or neglectful conditions prevail at that location that somehow threatens to jeopardize their son's potential for progress. Parents cite concerns regarding the design and location of the rooms at [School] and that overcrowding lends itself to an environment that may be over stimulating. The evidence has established that the school has been in use as a site for IU programs for many years. (FF. 33) Although this site is undoubtedly full of activity and children, the IU witnesses that testified have credibly established that they are professionals accustomed to dealing with children of various needs in a variety of settings and most importantly working toward their individual goals. (FF.29, 31-35) Based on a totality of the evidence, the delivery of Student's programming at [School], should it occur, would not be compromised in any meaningful fashion.

Finally, Parents contend that a disruption of the bond their son has developed with his current therapist could be detrimental. The IU originally contracted with ATA for the provision of relationship based therapy because it had no one, in-house, to provide this service. (FF. 18, 37) At this time, the IU has two OT's with this training that are available to provide programming to Student. (FF.29) Although the preferences of a recipient of

³ In *Shaffer v. Weast*, 2005 WL 3028015 (Nov. 14, 2005), the U.S. Supreme Court held that the party pursuing a claim bears the burden of proof by providing substantive evidence in support of their claims.

special education programming should be considered, whenever practicable, that consideration is secondary to the obligation of the IU to provide FAPE. The IU has proposed programs and options to assist with Student's transition and to ensure that his care and progress are minimally disrupted. (FF. 25) The IU's offer need not be optimal but nor may it merely provide trivial benefit. Student has successfully made transitions before within the IU and will undoubtedly have to do so again. With the support of his Parents and therapists he can be prepared for these changes in a manner that is minimally disruptive. In this case, the IU has offered a variety of occupational therapy options and choices that are sufficiently individualized, responsive to Student's unique needs yet calculated to provide meaningful educational benefit.

Social Skills

Next, Parents contend that the environment of the proposed social skills program is not appropriate and will not afford their son educational progress. Since October 2005, Student has received social skills training at "ATA". (FF. 39) This program is relatively new and was developed four months prior to Student's enrollment. (FF. 39) Again, Parents desire for Student to continue receiving these services privately, at ATA, at public expense.

The IU has offered Student and his Parents a six-week social skills program at the [Redacted] Center, the School or with two different private providers. (FF. 36) At the end of six weeks, the IEP team would review the progress of Student to determine whether he should continue in the program. Parents rejected this option citing the same environmental concerns, previously discussed as well as concerns that the IU staff could not sufficiently continue the relationship based methodology in the social skills program.

For the following reasons, Parents have not met their burden of establishing that the IU has failed to offer FAPE with regard to the social skills program. The IU originally responded to Student's needs for social skills training by offering direct teaching of social skills in a dyad with another child as well as providing the opportunity to practice those skills in a small group setting. (FF. 24) As with the OT proposal, Parents

current dissatisfaction stems from programming concerns as well as issues with the suggested locale. ⁴

The evidence has established that the proposed social skills program offered at the [Redacted] Center and School are appropriate. Parents originally rejected the program at [Redacted Center] citing it was too far and that it was not methodology specific. At both [Redacted Center] and [School], Student could receive his social skills program utilizing a DIR methodology. (FF. 36) [Redacted Center] and the School are both readily accessible from the Center where Student attends pre-school. In response, to Parents rejection of [Redacted Center], the IU offered to create a DIR social skills program at the school since it was closer to [Center]. Parents rejected this proposal on the grounds that [School] is unsafe and overcrowded. Student did sustain a minor injury with a toy at the school in the past; however that it and of itself does render the entire location inappropriate for all times.

Next, Parent has raised concerns about the methodology to be used during the social skills program. To alleviate parental concerns regarding methodology, the IU proposed that 2.0 hours a month would be devoted to consultation from the IU provider to share methodology specific to DIR with the staff who would be running the social skills group. (FF. 25) Furthermore, both of the offered IU's social skills program would utilize the relationship based methodology desired by Parents. These programs are staffed by a certified special education teacher and the occupational and speech therapists are able to consult with the classroom teacher. (FF. 36) Furthermore, children for the social skills classes are selected based on a review of their IEP and goals to ensure that they are appropriate for the class. (FF. 36)

Based on the foregoing, the IU has offered an appropriate social skills program and has tried a variety of avenues to support Parents in their pursuit of a relationship based therapeutic approach. The issue in this case is not

⁴ The IDEA affords children with disabilities many rights including the right to a due process hearing over issues concerning the identification, evaluation, programming and placement. 34 C.F.R. §§300.507-33.300.511; 24 Pa. Code §14.162. Generally court have interpreted the term "current educational placement" to include the setting in which the IEP is implemented, but is generally not considered to be location specific. See AW by Wilson v. Fairfax County Sch. Bd., 41 IDELR 119 (4th Cir. 2004). Generally when no change of program or placement is in contention, no jurisdiction exists for a due process hearing. In this case, Parents issues with programming are co-mingled with their issues of location such that a necessity existed to address both.

whether ATA is “optimal” because it is more convenient, Parents like it more or even because Student has bonded with his care providers, the issue is whether the programming offered by the IU is designed to offer meaningful educational benefit. These programs do. Accordingly, the IU has offered FAPE which Parents have rejected.

ORDER

Accordingly, as the IU has offered a free appropriate public education to Student no remedy is due.

By: Joy W. Fleming
Joy Waters Fleming, Esq.
Special Education Hearing Officer
March 15, 2006