

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 R. F.

Date of Birth: xx/xx/xx

ODR File Number: 6362/05-06/AS

Date of Hearing: April 11, 2006

CLOSED HEARING

Parties:

Representative:

Pro se

East Penn SD
800 Pine St.
Emmaus, PA 18040

Marc Fisher, Esq.
515 Linden St.
Allentown, PA 18101

Date Transcript/Exhibits Received:

April 15, 2006

Date of Closing Statements/Record
Closure:

April 16, 2006

Date of Decision:

April 30, 2006

Hearing Officer:

Joy Waters Fleming, Esq.

Background

“Student” is currently [elementary school-aged] and enrolled in the East Penn School District, “District”. (FF. 1-2) Student is eligible for and currently receives special education.

Issues

- 1) Did the District deny Student FAPE by failing to provide necessary homebound instruction during the 2005-2006 school year?
- 2) Did the District fail to conduct a timely re-evaluation of Student which resulted in a denial of FAPE?¹

Findings of Fact

1. “Student” is currently [elementary school-aged] and in the fourth grade in the East Penn School District, “District”. (N.T. 14)
2. Student transferred to the District in September 2005 having previously attended school in a neighboring District. (SD-3, N.T. 14, 26)
3. The District’s policy governing the receipt of homebound instruction requires that a request come from a licensed practitioner of the healing arts and that a student be out of school for more than two weeks. (SD-2)
4. Student receives special education through a part-time emotional support placement with speech/language and occupational therapy services. (SD-7)

¹ Parent initially raised the issue of the propriety of a proposal by the District to place Student in a full-time emotional support placement. Before the hearing, this matter was resolved and Parent signed a NOREP agreeing to a part-time emotional support placement for Student. (N.T. 9)

5. Student was eligible for but did not receive a re-evaluation in October 2005. (SD-3, N.T. 26-28)
6. On November 23, 2005, Student's physician advised the District that he should be excused from gym, receive an extra ten minutes between classes and that he would be out of school from December 8, 9, 12, 2005 because of [redacted] surgery. (SD-1, N.T. 15)
7. Student did not attend school from December 8, 2005 until after January 2006. (N.T. 31)
8. The District never received a request for homebound instruction for the December-January 2006 period from Parent. (N.T. 15)
9. On March 28, 2006, Parent granted permission for a re-evaluation of Student. (SD-8, N.T. 26)

Discussion and Conclusions of Law

The IDEA 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).

First, Parent contends that Student was denied FAPE because he was eligible for but did not receive homebound instruction after receiving a [redacted] surgery in December 2005 that necessitated his absence from school.

“Homebound instruction” and “instruction in the home” are two distinctly different concepts. Instruction conducted in the home is recognized as a placement option on the continuum of alternative

placements for students with disabilities but is restricted to students whose needs require full-time special education services and programs outside the school setting for the entire day. 34 CFR §300.551(b) (CFR §300.26(a) (1).

Instruction in the home, which is listed in the continuum of special education alternative placements in federal regulations, should not be confused with "homebound instruction," which describes the instruction a district may provide when a student has been excused from compulsory attendance under 22 Pa. Code §11.25 due to temporary mental or physical illness or other urgent reasons. It is homebound instruction to which Parent refers in her allegation of a denial of FAPE.

Although homebound instruction is not a special education placement option for students with disabilities, there are occasions when a student with a disability may receive homebound instruction due to a temporary excusal from compulsory attendance in the same manner as the student's non-disabled peers. If homebound instruction is approved, a District must file reports with the Department of Education. Attached to those reports must be a physician's recommendation for homebound instruction. The *Cordero*² court, addressed both homebound education and instruction in the home by requiring special reporting and interagency requirements. Once students are in either arrangement for more than thirty days, districts must produce a report to the state declaring such students as members of the *Cordero* class, and then must update the state regularly. This reporting process triggers the second requirement, which is that districts must reach out to other agencies in the community and to the state for help in finding an appropriate program and placement for the students.

In this case, the District's policy governing eligibility for homebound instruction has two requirements. (FF. 3) First, an application for homebound requires written certification from a "licensed practitioner of the healing arts" specifying the illness and expected duration of absence. (FF.3) Second, the application will not be approved unless the expected absence from school will be for at least two weeks. (FF. 3) Student received [redacted] surgery and the District was presented with a physician's note, dated November 23, 2005, requesting his excusal from for three days. (FF. 6) The physician's request does not mention homebound or out of school instruction but simply indicates that Student was expected to be "out of

² *Cordero v. PA Dept. of Educ.*, 19 IDELR, 624 (M.Pa. 1993). *See also* BEC, "Instruction Conducted in the Home," 34 CFR §300.26(a)(1)

school for 12/8/05, 12/9/05, & 12/12/05” apparently for a surgery. (FF. 6) It is the second prong of the District’s eligibility policy which Parent has failed to demonstrate was fulfilled. Under the remarks section of the medical excuse, Student’s physician clearly indicates that Student would be out of school for three days. (FF. 6-8) The three day time period as reflected on the physician’s excuse from November 23, 2005 does not qualify Student for homebound instruction in his school District. Furthermore, Parent has not introduced any evidence that a request for homebound instruction exceeding the three day request was ever provided to the District.³ Accordingly, Parent has not established by a preponderance of the evidence that the District denied her son FAPE.

Next, Parent contends Student did not receive an evaluation in a timely manner. As an eligible student, Student is entitled to a re-evaluation every three years. 34 CFR §300.536 In this case, Student was due for a re-evaluation in October 2005; however, the District did not commence the process until five months later in March 2006. (FF. 4-5, 9) In testimony, the District readily conceded this oversight and accepted full responsibility for the error.

A student may be denied FAPE when a procedural violation results in the loss of educational opportunity or benefits, or seriously infringes upon the parents’ opportunity to meaningfully participate in the IEP process. W.G. Board of Trustees of Target Range School District No. 23, 18 IDELR 1019, 960F. 2d 1479 (9th Cir. 1992). Parent has made no allegation nor introduced any evidence supporting the contention that Student’s programming between October and March was affected or that she was somehow prevented from participating in the IEP process. On the contrary, Student had an IEP in place that provided him with programming that was largely unchallenged by Parent. Overall, the evidence has established that Parent has not established that FAPE was denied Student between October 2005 and March 2006.

³ During the hearing, Parent insisted that she provided a request for homebound to the District. The record remained open for the receipt of this additional evidence. No request or any documentation was provided from Parent after the hearing. (N.T. 52)

ORDER

And now, this 30th day of April 2006, Parent's request for relief on grounds that Student was denied a free appropriate public education by the District is denied.

By: Joy W. Fleming
Joy Waters Fleming, Esq.
Special Education Hearing Officer
April 30, 2006