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Decision

Due Process Hearing for Student

Date of Birth: xx/xx/xx

File Number: 6981/06-07

Date of Hearing:

October 20, 2006

OPEN HEARING

Parties:

Mr. and Mrs.

Beth Campagna
Penn Manor School District
PO Box 1001
Millersville, PA 17551

Representatives:

Stephen Russell, Esq
Susquehanna Commerce Center East
221 W. Philadelphia Street, 6th Floor
York, PA 17404

Date Transcript/Exhibits Received:

October 24, 2006

Date of Decision:

November 4, 2006

Hearing Officer:

David F. Bateman, PhD

I. BACKGROUND

Student is a xx-year old eligible resident of the Penn Manor School District (District) who receives gifted support. His Parent requested this hearing relating to the expected levels of achievement in his Gifted Individualized Education Plan (GIEP). There was a previous due process hearing in this matter with the hearing officer ruling Student was to receive accelerated education in the sixth grade math curriculum with a level of achievement of 80%. The Parent is seeking a level of achievement of 90% in his math achievement instead of the 80% as Ordered by the previous due process hearing officer. The District stated it has at all times satisfied the requirements of Chapter 16 and is following the Order of the previous due process hearing officer.

II. ISSUE PRESENTED

What should be the appropriate proficiency applied in Student's sixth grade math curriculum?

III. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. He is currently xx-years old in fourth grade (P-2).
2. Student is a resident of the Penn Manor School District (P-2; S-1).
3. Student is eligible for services as a student who is gifted (S-2).
4. A GIEP was developed for Student on May 23, June 1, and June 7, 2006 (P-6). The annual goal for math states Student will be able to demonstrate knowledge of the sixth grade curriculum with an average class score of 85% or higher (P-6, p. 6). The specially designed instruction states: Individualized enrichment activities for sections of the chapter at the sixth grade level will be offered in topics based on the classroom standards (P-6, p. 6).
5. Student's report card from his third grade year indicates all A's for math during the year (P-11).

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents' evidentiary exhibits will be designated "P" followed by the relevant exhibit number.

6. The Parent filed for a due process hearing on June 12, 2006 (P-12). The purpose of that hearing was the level of proficiency needed to be shown in the fifth grade assessments.
7. A hearing was held on July 12, 2006 (P-5). The issue in that hearing was what should be the appropriate proficiency level to be applied in Student's fifth grade math assessments for purposes of acceleration into the sixth grade math curriculum (P-4, p. 4).
8. The hearing officer issued a decision on August 1, 2006 stating: Student's GIEP shall include a goal that Student should be taught to 80% proficiency in the 5th grade math curriculum; and Student's GIEP shall include a goal that Student shall be taught to 80% proficiency in the 6th grade math curriculum; and Student's GIEP shall provide that Student shall be placed in the 6th grade math class at the beginning of the 2006-2007 school year (P-4, p. 11).
9. A GIEP was developed for Student on September 20, 2006 (P-2; S-1). One of the annual goals for math states: Student will be able to demonstrate knowledge of the sixth grade math curriculum with a minimum of 80% proficiency (P-2, p. 5).
10. A notice of recommended educational assignment was provided to the Parents on September 20, 2006 (P-1). The Parent signed they agreed to the recommendations however they disagree with the levels set for math (P-1, p. 5).

11. On September 21, 2006 the District sent the Assurance for the Implementation of Due Process Hearing Order to the Office for Dispute Resolution (S-2).
12. The gifted support teacher works with Student on mastery in the fifth grade curriculum (S-4). His level of mastery is at 83% in the fifth grade math curriculum (NT 85).
13. Student's math grade so far this year is an 88% (NT 101). The material covered in the 2006-2007 school year has been a review from the previous year (NT 54-55).

IV. DISCUSSION AND CONCLUSION OF THE LAW

A Due Process Hearing was requested because Student's father is seeking the following relief for his child: a change in the appropriate proficiency level for Student's math goals from 80% to 90%. The District maintains that not only the 80% level of proficiency is appropriate for Student for his sixth grade math performance, but also they are doing this because of an Order from a recently completed due process hearing. The District maintains that it has at all times satisfied the substantive and procedural requirements of the Chapter 16 with regard to the provision of gifted education services to Student, and is following the Order of the previous due process hearing.

Appropriateness of the IEP

Pennsylvania Regulation § 16.41 states that districts are obligated to ensure the following for gifted students:

- (a) The GIEP team shall base educational placement decisions on the gifted student's needs.
- b) Districts may use administrative and instructional strategies and techniques in the provision of gifted education for gifted students which do not require, but which may include, categorical grouping of students. The placement shall:
 - (1) Enable the provision of appropriate specially designed instruction based on the student's need and ability.
 - (2) Ensure that the student is able to benefit meaningfully from the rate, level and manner of instruction.
 - (3) Provide opportunities to participate in acceleration or enrichment, or both, as appropriate for the student's needs. These opportunities shall go beyond the program that the student would receive as part of a general education.

According to *New Brighton Area School District v. Matthew Z.* (Commonwealth Ct, 1997. 26 IDELR 717) and *Centennial School District v. Dept. of Ed.* (517 Pa. 540, 539 A. 2d 785, 1988), public schools are not legally obligated to provide gifted students with an IEP that is beyond the scope of the district's existing and regular education curriculum. The curriculum need not maximize the student's ability to benefit from an IEP but is only required to provide an appropriate program. "Appropriate" depends on how well the program satisfies the recognized needs of the individual child. Nothing in *Hulda A. v. the Easton Area School District*, 601 A. 2d 860 suggests that gifted students must be educated in pull out programs or that they should be educated in pull out programs to their detriment. The regulations above and all the case law cited repeatedly emphasize that GIEP decisions are to be made on an individual basis and that GIEP's must be reasonably calculated to afford the student meaningful educational progress. GIEP's are to be based on an individual student's needs.

This case is unique in that there was a recently completed due process hearing involving this student (FF:7 and 8). The issue in the previous due process hearing was what should be the appropriate proficiency level to be applied in Student's fifth grade math assessments for purposes of acceleration into the sixth grade math curriculum (FF:7; P-4, p. 4). The hearing was completed on July 12, 2006 with a decision from the hearing officer on August 1, 2006 (FF:8). As a part of his decision the hearing officer ruled:

Student's GIEP shall include a goal that Student should be taught to 80% proficiency in the 5th grade math curriculum; and Student's GIEP shall

include a goal that Student shall be taught to 80% proficiency in the 6th grade math curriculum; and Student's GIEP shall provide that Student shall be placed in the 6th grade math class at the beginning of the 2006-2007 school year (FF:8; P-4, p. 11).

The present due process hearing was requested on September 22, 2006 (P-1). The purpose of the present due process hearing was what should be the appropriate proficiency applied in Student's sixth grade math curriculum? The argument made by the Parents was the level of 80% was too low and should be moved to 90% while the District stated it is just implementing the decision of the previous due process hearing officer who said as a part of his Order the level of proficiency should be 80% (P-4, p. 11; NT 72-73).

The Parents argued during the hearing that it was not res judicata:

I think there's confusion regarding the School District's role in the development of the GIEP. I think it has capitulated to the decision of a Hearing Officer, a fine Hearing Officer. But he's decided an issue not before him with no evidence presented. The School District clearly has not --- the School District thought the issue was the same, I believe they would have raised a res judicata objection. I believe they know the issues aren't the same (NT 128-129).

The District stated as a part of their closing argument:

The Hearing Officer did, in fact, order that we have an 80 percent proficiency level. So we're stuck with that, and I would submit to you, realizing that you are independent, that you should not reverse that prior decision rendered by the prior Hearing Officer. (NT 126)

The Pennsylvania Special Education Dispute Resolution Manual defines res judicata as:

Chapter 12 - Questions of Jurisdiction and Res Judicata

1201. Questions of Jurisdiction

The Hearing Officer, based on materials received from ODR prior to the hearing, discussions with the parties during a conference call, or after listening to opening statements, may raise the question of whether or not the issue(s) to be heard at the hearing are within his or her jurisdiction. Both parties, either before the start of the hearing or at the hearing may file motions to dismiss some or all of the issues based on questions of jurisdiction. Jurisdictional challenges may occur if the hearing officer is not empowered to address the issue being presented, or if the issue is subject to the doctrine of res judicata. Res judicata is a legal principle that denies the same parties the right to relitigate an issue on which a final decision has been rendered in a previous litigation. In other words, a party only has one opportunity to argue a case in any one court, unless an appeal is filed.

Examples of res judicata:

- A. The LEA prevailed at the prior hearing and all four of the following apply to the present hearing: the LEA's program and/or placement is the same; no new circumstances have arisen which might result in a reversal or modification of the earlier decision; there has been no change in law, regulation, or policy in the interim between the hearings which might require reversal or modification of the prior decision; and there is no manifest error on the record of the previous hearing. If the prior decision was appealed and no manifest error was found in the record by the Appeals Panel, the record is assumed to be free from manifest error and cannot be reviewed by a Hearing Officer; or
- B. The LEA did not prevail at the prior hearing and all five of the following apply to the present hearing: the LEA's program and/or placement is the same; the parent's program is the same; no new material is introduced; there has been no change in law; and there is no manifest error.
- C. The passage of a significant period of time since the previous hearing may itself raise new issues. For example, a child of thirteen (13) might not have needed a transition program, but would as a fourteen (14) year old.

A previous Appeals Panel Decision has helped to define res judicata:

Correctly, the Hearing Officer sets forth the parameters of the *res judicata* doctrine. It operates to bar consideration in a later action of that which was the subject of an earlier action, in terms of whether those later proceedings consider what was or could have been raised in the earlier one. See Thomas v. Brown, 868 F. Supp. 959 (E.D. Pa. 1997); Balent v. City of Wilkes-Barre, 542 Pa. 555 (1995); In Re the Educational Assignment of E.R., Special Education Opinion #1209; In Re The Educational Assignment of B.C., Special Education Opinion #1262. The elements to be considered in assessing satisfaction of these requirements, which are applicable in special education due process proceedings, are identity of claims and issues, identity of the parties, and a prior decision on the merits. See Dempsey v. Cessna Aircraft Company, 439 Pa. Super. 172 (1995); In Re The Educational Assignment of S.M., Special Education Opinion #1579; In Re The Educational Assignment of E.S., Special Education Opinion #1291.²

A close reading of the transcript from the previous due process hearing indicates that although the level of percentages for the sixth grade curriculum was not the main issue, it is clear testimony was provided for the hearing officer to make his determination. Specifically, a reading of the totality of the transcript indicates the discussion of the percentages for successful completion exists throughout the transcript. There was a question about the level of success of 90 versus 80 (P-5, p. 22); a question about the level of percentages for acceleration of 70% or 80% (P-5, p. 27); and there was a question by the Hearing Officer relating to percentages for success (P-5, p. 34). The percentage is also included in a summary of the testimony by counsel for the District (P-5, p. 42).

² In Re Educational Assignment of K.B., Spec. Educ. Op. 1605 (2005).

Though there is not a lot testimony or exhibits shared as a part of the previous due process hearing relating to the level of proficiency of 80% for the sixth grade curriculum, there is a previous due process hearing Order indicating that should be the level of proficiency. The District has even sent a letter of assurance to the Office for Dispute Resolution indicating they are following his order (S-2).

In the previous due process hearing both parties were provided a copy of the procedures to appeal the decision of the hearing officer (P-4, p. 1; P-5, p. 4). The appeals panel procedures state:

1108. Failure to File

- A. Failure to file exceptions to the decision of the Hearing Officer within the time allowed shall constitute a waiver of all objections to the decision.
- B. Failure to file a response to exceptions filed by the opposing party shall constitute a waiver of the right to file a response.

In this case the District modified the GIEP as Ordered by the hearing officer, and then sent the NORA to the Parents. This triggered the present due process hearing.

There was a decision, and an Order. As stated above, a failure to file within the time allowed shall constitute a waiver of all objections to the decision. The purpose of the present due process hearing was basically to determine whether the ruling of the previous due process hearing officer was appropriate. It is the opinion of this hearing officer that since there was a previous Order on the issue, this hearing officer has no authority to overturn a hearing officers ruling and to make a determination about whether the Order of 80% for the sixth grade curriculum is appropriate.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that there is a previous order from a special education due process hearing officer and this hearing officer has no authority to overturn that decision.

Date

Hearing Officer