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THE SPECIAL EDUCATION APPEALS PANEL
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT : SPECIAL EDUCATION
OF J. D., A STUDENT IN THE :
COLONIAL SCHOOL DISTRICT : OPINION NO. 1120

BEFORE APPEALS PANEL OFFICERS
HEETER, McAFEE and TITTERON
OPINION BY HEETER, APPELLANT OFFICER

BACKGROUND

Student is a ten-year old student who resides within the Colonial School District ("District") and attends a private school, the Woodlyne School. Student has never attended school in the District. (NT 23, 33) It was stipulated that Student has a learning disability in accordance with the Individuals with Disabilities Education Act ("IDEA") and Chapter 14 of the Pennsylvania Code. (FF3, NT 29)

Initially, contact with the school was made in September of 1999. First via a telephone call, then by letter dated September 21, 1999 requesting a multi-disciplinary evaluation, as well as a comprehensive evaluation report and an Individual Educational Plan ("IEP"). (NT 33-37, SD#3) The parent registered Student in the District on September 24, 1999, at

which time she checked on the form (Parent Survey of Public Awareness and Child Identification system) that she became aware of special services through a friend/neighbor. (SD#4)

The District conducted an evaluation of Student in October of 1999. (NT 45-51, SD#10) The evaluation included reports by a private psychologist completed in February of 1997 and a speech and language therapist completed in November of 1998. The report concluded Student is functioning in the average range of intelligence. On the achievement testing, she demonstrated well below average basic reading skills, basic math skills, and broad written language skills. Her broad reading, reading comprehension skills, and broad math skills were below average. Student's basic writing skills and written expression skills were also below average. Based on the data, Student met the criteria for a learning disability. Specially designed instruction in reading, math, and written skills were recommended. (NT 52, SD#10)

A MDT ("Multi-Disciplinary Team") meeting was held at the end of October, 1999. At that time, the parents weren't sure whether Student was going to attend school within the District after Christmas. (NT 53) The District recommended part-time special education class in the regular school. The mother requested to visit the learning support classroom. (NT 53, SD#25) A meeting was arranged with the learning support teacher

who spent approximately three (3) hours with the mother in the classroom observing. (NT 53) This meeting took place after the CER in October 1999. (NT 54) While attempting to arrange an IEP meeting , the District received a letter dated December 18, 1999, from parent's attorney requesting a due process hearing. That hearing was dismissed without prejudice in early 2000.

On January 10, 2000, the District sent an invitation to the parents to participate in an IEP meeting on January 19, 2000. (SD#14) On January 5 and 12, 2000, the District was notified that all communication to the parents should be addressed to their attorney. At that time, the parents also stated the dates for the IEP meeting were not acceptable, as their attorney was not available. (SD#14,15) The District again notified the attorney, stating a meeting was scheduled for January 19, 2000 and to please notify the District of his attendance by January 18, 2000. Further stating if no response was received, the meeting would take place as scheduled on January 19, 2000. (NT 17)

An IEP meeting took place on January 19, 2000 without the parents or their attorney. (NT 55-57, SD#25) Copies of the IEP were sent to the parents and to their attorney. (SD#25) This IEP recommended placement in a part-time learning support class. (NT 57, SD#25) The District subsequently held another IEP meeting for Student on February 14, 2000. This was done because

the parents and their attorney did not attend the January 19, 2000 meeting. (NT 51-59, SD#26). At the February 14, 2000 meeting, the parents requested that an independent psychological report be reviewed, which the District agreed to do. (NT 59) Subsequently, the District sent a draft of the IEP developed at the February meeting, as well as the Notice of Recommended Assignment ("NORA") to the parents in April without having received the parent's report. (NT 57, 101-102)

Parents returned the NORA unsigned in a letter dated May 5, 2000. They stated in this letter that all correspondence was to go through their attorney and that they had recently received a new evaluation of Student and expected discussions to resume. (NT 61, SD#33) The evaluation referenced in the May 6 letter was not sent to the District until two days prior to the November 21, 2000 Due Process Hearing. (FF17, NT 61, 148-151)

The parents' expert testified at the Due Process Hearing but a written report was not entered into evidence. She observed Student in her classroom at Woodlyn School. She noted Student's hyperactivity and her "tremendous" difficulty reading. (NT 120-123) She further stated that although Student was very hyperactive and looked as if she was inattentive, there were times the teacher would ask a question and Student was right there with the answer. (NT 122) The teacher in the classroom did not attempt to pull Student back to attention but rather, on

this day, let her go so the evaluator could observe and see how these factors affected her behavior. (NT 123) The evaluator concluded this classroom (at Woodlyne School) was appropriate for Student. She was receiving the support she needed. (NT 123). However, it needs to be noted, the evaluator never had the opportunity to observe Student in a District classroom, as she never attended school in the District. (NT 123-124)

The parents' expert states the emotional components to address Student's needs such as frustration and anxiety are not addressed in the IEP. (NT 128) The District's psychologist agrees there is no specific goal addressing this issue, however, she states that many of these goals are subsumed in the other goals. These goals are written in terms of helping her understand, ask questions to understand that will help correct her frustration. (NT 106) Further, Student's frustration and anxiety can be addressed in a Learning Support class, which was recommended. (NT 158) Redirecting her activities can keep Student on task despite her inattentive behavior. (FF20-21, NT 158)

On September 5, 2000, the parents' attorney notified the District via letter that they were renewing their request for a Due Process Hearing. SD#34-35) The hearings were held on November 21, 2000 and February 28, 2001. The Hearing Officer's Opinion was received by the Office for Dispute Resolution

("ODR") on March 21, 2001. Parents' counsel attached a Declaration dated April 10, 2001 which declares his office did not receive the Hearing Officer's decision until March 30, 2001, after repeated requests to ODR to forward the decision to him. Parent's counsel also states he did not receive the decision directly from the Hearing Officer. Parents' exceptions were received via facsimile on April 17, 2001. The District's response was received on April 26, 2001 by ODR.

In his decision, the Hearing Officer ordered that:

1. Student is not entitled to tuition reimbursement for the school years of 1997-98 through 2000-01.
2. Student was offered an appropriate IEP for the 2000-01 school year.
3. The District's Child Find requirements did not violate Federal or State law.

ISSUES

The parents filed exceptions to the Hearing Officer, asserting that the hearing officer erred when he concluded:

1. That the proffered IEP offered a free appropriate public education;
2. That the school district did not violate the Child Find provisions of IDEA for the 1997-98 school year; and
3. That the compensatory education claims for the 1998-99 and 1999-2000 school year must be rejected.

The District responded to these exceptions stating that the Hearing Officer, based upon the evidence presented, determined that the District had offered Student a FAPE in the least restrictive environment. Further, the district asserts the evidence in this case overwhelmingly supports the appropriateness of the proposed IEP. Secondly, the District responds to the Child find exception, stating the Hearing Officer's determination on this point is correct as a matter of law and supported by the evidence of record. And third, the District states the Hearing Officer clearly indicated that the remedies being sought are tuition reimbursement from the years 1997-98 through 200-01. Therefore, because the parents did not assert claims for compensatory education, the Hearing Officer did not err in not awarding compensatory education.

DISCUSSION

Parents of children eligible for special education are free to send their child to a private school. However, a parent who elects to do so, does so at his or her own financial risk. It is well established that, if a school district or local educational agency ("LEA") fails to offer a FAPE for a child with a disability requiring specially designed instruction,

parents have a right to seek reimbursement of the private school tuition. Burlington v. Dept. of Educ., 471 U.S.359 (1985); Florence County School District Four v. Carter, 114 S.Ct. 361 (1993); In Re the Educational Assignment of T. K., Special Education Opinion #554, In Re the Educational Assignment of J. A., Special Education Opinion #1064.

The Supreme Court set forth a two-prong test to determine whether a district has offered a student FAPE. First, has the district complied with the procedures set forth in IDEA? Second, is the IEP substantively reasonably calculated to allow a student to resume meaningful progress? Board of Education v. Rowley, 458 U.S. 176 (1982).

Furthermore, in Pennsylvania, the regulation specify the requirement for an IEP at 22 Pa. Code §14.32:

"The IEP of an exceptional student shall contain the following:

- (1) A statement of the student's present level of educational performance.
- (2) A statement of annual goals and short-term learning outcome which are responsive to the learning need identified in the evaluation report.
- (3) A statement of the specific special education services and program and related services to be provided to the student.

As to the procedural issues, the District promptly responded to the parents' request for an evaluation in September of 1999. (NT 45-51, SD#10) This was followed by a CER dated October 20, 1999. (SD#10) The District acquiesced to the

parents' request after the CER meeting to have Student's mother observe the Learning Support class with the Learning Support teacher. As the Hearing Officer states, the District was in error in not conducting an IEP meeting by approximately November 30, 1999, as prescribed by Pa. Code §14.32(i)(1). Further he observed there was no testimony presented as to why there was a delay in scheduling the meeting. Evidence does suggest an IEP meeting was being discussed between the parties prior to January 5, 2001. We agree with the hearing Officer that this delay does not constitute a fatal flaw which harmed or prejudiced Student's ability to receive FAPE. Of more concern is that the parents and their attorney stymied the District when they attempted to schedule a January 19, 2001 IEP meeting. The parents' attorney failed to respond to date requests from the District's attorney on numerous occasions. (SD#13, #16) The parents and their attorney were absent from this IEP meeting. Another was held in February, 2001 with all parties present. However, at that time, the parents requested the District review an outside psychological report, which they agreed to. That report was not shared with the District until November 2000, at the time of the due process hearing. As the Hearing Officer stated, the parent's action of sitting on a proffered IEP for approximately nine months seems unreasonable. We agree with the Hearing Officer that any procedural error by the District does not

constitute a fatal flaw that harmed or prejudiced Student's ability to receive FAPE. More importantly, the parents own actions and inaction resulted in significant delay. We cannot hold the district responsible for what was beyond their control.

The proffered IEP was also designed to confer meaningful benefit. The substantive portion of the proffered IEP was based on, and responsive to, the results of the CER. The CER was developed on all available information. The District did not have the report of the parents' expert at any time during the IEP process because the parents did not share it. The parents cannot now rely on information from that expert to assail the IEP. That is hindsight or Monday-morning quarterbacking which is prohibited by Fuhrmann v. Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993). That court states, "neither the statute nor reason countenance 'Monday Morning Quarterbacking,' in evaluating the appropriateness of a child's placement." The measure of adequacy of an IEP can only be determined at the time it was offered to the student and not some later date. Id.

In the present case, the District was ready and willing to review the evaluation of the parents' expert. However, given the parents' continued and substantial delay tactics in the face of numerous requests by the District, it appears disingenuous to now lay blame at the feet of the district.

The parents' expert observed Student at the Woodlyn School but not in the district's proffered placement. On direct examination, she stated the District's CER did not address the anxiety and need for soothing, as well as Student's hyperactivity and inattention. (NT 127) In hindsight, she further states Student needed teacher support, and a highly structured, multi-sensory approach with sequential alphabetic-phonics approach to reading because she needs to learn decoding. (NT 133) This is all information the District could have used in developing the proffered IEP but which was withheld from the District. More importantly, the Hearing Officer stated this expert did not offer compelling testimony that the District's proffered IEP did not constitute FAPE. Further, he stated, "there were many questions regarding Student's program at Woodlyne that the expert was not able to address, and this influenced the degree of credibility afforded her testimony. (H.O. 5)

This appeals panel in In Re the Educational Assignment of L. B., Special Education Opinion #922 stated, "As the finder of facts, the hearing officer has undisputed authority to assess and establish credibility." (22 Pa. Code §14.64(e)). Appeals panels are "required to defer to the hearing officer's credibility determinations 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.2d 520, 524 (3d Cir. 1995) The hearing officer's determination is entirely defensible within the record." Likewise, in this case we will not disturb the hearing officer's determination of credibility.

The evidence in this case overwhelmingly supports the appropriateness of the proposed IEP and placement in the least restrictive environment. We agree with the Hearing Officer. Therefore, we affirm the decision of the hearing officer that Student was offered FAPE and that any delay in that offer was attributable to parental actions.

We now turn to the issue of child find. Under Federal and State law, school districts must institute a proactive system to locate and identify all children thought to be eligible, including children attending private schools. 22 Pa. Code §14.22, 22 Pa. Code§342.22, 20 U.S.C. §1412(3). 22 Pa. Code §342.22(b) states:

"A school district shall provide annual public notification, published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the school district, of child identification activities... ."

The District publishes the required notices in local newspapers informing parents of children attending private

schools of the manner in which they can obtain special services for their children. The panel accepted the fact of the district having published a notice in local newspapers as a valid means of meeting its notification requirements. See, In Re the Educational Assignment of A. W., Special Education Opinion #1033. In this case, the district also published special education related notices in a widely distributed local newspaper ,a school calendar sent out to parents and informing parents of special education services at the time of registration. Of equal importance, the Hearing Officer held, once Student was brought to the attention of the District, it quickly evaluated her and sought to develop an appropriate program for her. The panel affirms that the District did not violate its Child Find obligation. Therefore, this exception by the parents is denied.

The third exception by the parent states the Hearing Officer erred as a matter of law denying the "compensatory education" claims for the 1998-1999 and 1999-2000 school years. Compensatory education was not an issue at the Hearing. At the beginning of the Due Process Hearing, NT 28, the Hearing Officer clearly stated what the issues were from the point of view of the parent.

Hearing Officer: "And they are ... but in essence, asking for tuition reimbursement for the years 1997-98, 1998-99, 1999-

2000; and secondly, an issue of whether or not the district has offered Student FAPE for the 2000-01 year, and if, in fact, they did not offer FAPE for the 2000-01 year, that they are entitled to tuition reimbursement for the 2000-01 year"

Mr. Christian: "Yes."

These same issues were reiterated in the Hearing Officer's Opinion at page 1.

It must be noted that tuition reimbursement and compensatory education are two distinct remedies. They are not interchangeable. Tuition reimbursement is a remedy to parents who have unilaterally placed their child in a private school when a district offers their child an inappropriate educational placement and the proposed IEP was inappropriate under IDEA thereby failing to give the child FAPE. See In Re the Education Assignment of T. K., Special Education Opinion #554, Burlington School Committee, et al v. Dept. of Education, 471 U.D. 359, Florence County School District IV v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993). In contrast, compensatory education is a retrospective and in kind remedy for failure to provide an appropriate education for a period of time. See Lester H. v. Gilhool, 916 F.2d 845 (3d Cir., 1990); Carlisle Area School District v. Scott P., 62 F.3d 520 (3d Cir. 1990); and Johnson v. Lancaster Lebanon Intermediate Unit 13, 757 F.Supp. 606 (ED Pa 1991). As the Lester court stated, Lester is only requesting a

remedy to compensate him for rights the district already denied him. Lester, id.

We need not go further with our analysis of compensatory education since the parents did not assert claims for compensatory education during the hearing. Thus, the Hearing Officer did not err in not awarding compensatory education. Subsequently, the parents' third exception is denied.

Therefore, we affirm the hearing officer's decision in its entirety. Accordingly, we enter the following order:

ORDER

The decision of the Hearing Officer is affirmed. Student is not entitled to compensatory education nor are her parents entitled to tuition reimbursement. The district met its child find obligations.

In accordance with 22 Pa. Code §14.64(m), this Order may be appealed to the Commonwealth Court of Pennsylvania or the appropriate federal district court.

Lorraine J. Heeter, J.D.
For the Appeals Panel

Signature Date

Mailing Date