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**THE SPECIAL EDUCATION  
DUE PROCESS APPEALS REVIEW PANEL  
COMMONWEALTH OF PENNSYLVANIA**

**IN RE THE  
EDUCATIONAL ASSIGNMENT OF R. C., : SPECIAL EDUCATION OPINION  
A STUDENT IN CENTRAL BUCKS SCHOOL DISTRICT : NUMBER 1813**

BEFORE APPEALS PANEL OFFICERS  
MCAFEE, SKIDMORE, AND SALVIA

OPINION BY SALVIA, APPELLATE OFFICER

**BACKGROUND**

The student is a xx-year-old who has been eligible for special education services since preschool and who resides with his parents in the District. He attended private school from kindergarten through the fifth grade.

Student began attending a District elementary school for his sixth grade year (i.e., the 2004/05 school year). In December of that school year, the parents had Student evaluated by a certified school psychologist and found to have a verbal IQ of 104, a perceptual reasoning score of 92, a working memory score of 62 and a processing speed score of 62. These scores were combined into a full scale IQ of 79 that was not believed to be a valid estimation of his general intelligence because of the marked discrepancies among scale scores. In addition, the psychologist administered an individual achievement test in which Student earned average scores in reading and math skills as well as below average scores in spelling and oral expression. No score could be obtained for written expression. The psychologist diagnosed Student as having Pervasive Developmental Disorder-Not Otherwise Specified.<sup>1</sup>

In February 3, 2005 the parent consented to an evaluation by the District that was completed on May 4, 2005.<sup>2</sup> The evaluation team found Student's strengths to be his interests in social studies and science, his superior verbal reasoning and concept formation, his normal articulation and expressive and receptive language, and his average math and reading skills. The team concluded that Student was eligible for special education as a student with autism and a learning disability in written

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<sup>1</sup> School District Exhibit (hereafter SD) 2.

<sup>2</sup> Ibid.

expression. The team recommended Student receive direct, systematic small group instruction in written language, support in writing in the general education curriculum and speech and occupational therapy as related services.<sup>3</sup>

On May 24, 2005 a team met to develop an Individualized Educational Program (hereafter, IEP) for Student, and the parent approved a Notice of Recommended Educational Placement (hereafter, NOREP) recommending that Student receive special education services and specially designed instruction. Under the program, Student was to receive resource room learning support for writing and reading.<sup>4</sup>

On August 9, 2005, the parent approved another NOREP that incorporated revisions to Student's IEP. Student was then placed in a full-time autistic support program at a middle school located in the Centennial School District seventh grade program.<sup>5</sup> Beginning in October 2005, Student received math instruction, without accommodation, in a regular education classroom where his final grade was in the eighties.<sup>6</sup>

In February 2006, parent met with the District to discuss her concerns about Student's math progress, concerns in the home and social development.<sup>7</sup> On May 3, 2006, the IEP team met to discuss parent concerns about academic progress and inappropriate behaviors.<sup>8</sup> On May 12, 2006, the District met with the parent and agreed to conduct a functional behavioral assessment of (hereafter, FBA) Student because of parental concerns about lack of focus and engagement.<sup>9</sup>

On June 14, 2006, the IEP team convened and discussed the results of the FBA, a behavior support plan and Student's progress based on the results of an individually administered achievement test.<sup>10</sup> On July 19, 2006, parent met with the District and requested one-to-one instruction, partial day attendance at the private school Student had previously attended, a shortened school day, and instruction in the home.<sup>11</sup> At the conclusion of that meeting, the District presented parent with a NOREP recommending placement in a part-time autistic support classroom in the same middle school the Centennial School District. The parent disapproved the NOREP and requested a due process hearing.<sup>12</sup> On July 26, 2006, parent filed a request for a due process hearing but subsequently withdrew the request on October 31, 2006.

Student attended the private school at parent expense during the 2006/07 school year. On September 11, 2006, the District offered Student an autistic support placement in another middle school. On October 12, 2006 the IEP team met at the parent's request to discuss the program being offered by the District (e.g., resource room instruction for

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<sup>3</sup> Ibid.

<sup>4</sup> SD-3.

<sup>5</sup> SD-4.

<sup>6</sup> Notes of Testimony, page (hereafter, NT), 165-168

<sup>7</sup> NT 213.

<sup>8</sup> NT 40

<sup>9</sup> SD 14; NT 41, 176, 217.

<sup>10</sup> SD 8, 18; NT 48, 52/5, 128, 218.

<sup>11</sup> NT 59, 61

<sup>12</sup> SD 9; NT 62.

English, reading, and social skills with mainstreaming for 68% of the day).<sup>13</sup> Some goals and specially designed instruction were revised.<sup>14</sup>

The last IEP proposed for the 2006-2007 school year recognized Student's needs in spelling, reading comprehension, written expression, communication and attention to task.<sup>15</sup> It contained five goals designed to address Student's writing, spelling, reading, communication and attention needs.<sup>16</sup> This IEP failed to include a behavior management plan and instead proposed to address the behavior that impeded Student's learning through IEP goals and specially designed instruction.<sup>17</sup> The District proposed that Student would be instructed in a regular education setting with support from an aide in math, social studies, and science.<sup>18</sup> He would be instructed in English, reading and social skills in a special education resource room.<sup>19</sup> In addition, Student would receive speech and language instruction to address his pragmatic language skills.<sup>20</sup> The parent neither accepted nor rejected this placement.

On December 22, 2006, the District requested a due process hearing to obtain a ruling that it had made an offer of a free and appropriate public education (FAPE). A due process hearing was held in two sessions, beginning on February 3, 2007 and concluding one week later on February 10, 2007. An attorney represented the District while the parents appeared *pro se*. In her decision issued on March 19, 2007, the hearing officer (HO) raised, *sua sponte*, her jurisdiction over the issue. She concluded that the District had an interest in establishing whether their proffered program was appropriate. She then turned to the proffered IEP and placement and found that they were appropriate. The parents filed exceptions to the order, alleging that the HO erred in assuming jurisdiction, limiting the parent's ability to offer evidence, failing to consider the parent's evidence in her findings of fact, and finding that the District had met its burden of proof that it had provided FAPE in the LRE. The District responded to the exceptions.

## DISCUSSION

Review by the panel of a hearing officer's decision requires an independent examination of the record evidence, as well as a determination of whether an error of law has been committed. As finders of fact, hearing officers have considerable discretion in assessing the credibility of witnesses and weighing evidence<sup>21</sup> unless the non-testimonial, extrinsic evidence in the record justifies a contrary conclusion or unless

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<sup>13</sup> SD 17, 21; NT 68/9.

<sup>14</sup> NT 72, 316/7.

<sup>15</sup> SD 23; NT 410.

<sup>16</sup> SD 23; NT 150

<sup>17</sup> SD 23.

<sup>18</sup> SD 23; NT 263-274.

<sup>19</sup> SD 23.

<sup>20</sup> NT 275.

<sup>21</sup> See *Colonial Gardens v. Commonwealth*, 382 A.2d 1273, 1275 (Pa. Commw. 1978).

the record read in its entirety would compel a contrary conclusion;<sup>22</sup> however, their conclusions of law do not command the same deference.

### HO's Jurisdiction

During the 2006/07 school year, the parent attempted home schooling although she does not appear to have completed the necessary forms to do so. It appears that around October 27, 2006, the parent formally withdrew Student from Central Bucks School District and made no further requests for services. Months later the District requested this due process hearing.

§14.162(c) of 22 PA Code clearly gives a school district the right to request a due process hearing when a parent rejects a district's proposed educational program or placement. Although the parent has neither accepted nor rejected the District's most recently offered IEP, her last definitive act was to reject the program offered by the District.<sup>23</sup> Therefore, we find that the HO did not err when she allowed the District to proceed with the belated due process hearing.

### Limitation and Consideration of Parent's Evidence.

It must be noted from the start that due process hearings do not follow the technical rules of evidence.<sup>24</sup> Nevertheless, the parent's ability to present testimony was repeatedly hindered by the HO's adherence to strict rules of evidence. However, we find that any error committed by the HO in limiting the parent's ability to present evidence was not prejudicial. The District bore the burden of proof because it requested the due process hearing,<sup>25</sup> and it failed to meet its burden. Additional testimony and evidence by the parent might have enriched the record regarding the District's failure to offer FAPE, but in the final analysis additional evidence would have been cumulative.

### District's Provision of FAPE

As the party who sought a due process hearing, the District has the burden of establishing that it had offered to provide FAPE in the least restrictive, appropriate environment (LRE).<sup>26</sup> Until the expiration of the 2005/06 IEP in October 2006, Student's 2006/07 school year was initially governed by the IEP and NOREP to which both sides agreed in October 2005. Upon the expiration of that IEP, either a new IEP would be put in place or Student would continue under the old IEP until disputes over a new IEP could be settled.

The IEP for the 2005/06 school year should have been based on the Educational Report (ER) prepared in 2005.<sup>27</sup> The District's last ER (S-2) listed Student's needs as follows: improvement in pragmatic language and social interaction skills; increased

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<sup>22</sup> *Carlisle Area School District v. Scott P.*, 62 F2d 520 (3<sup>rd</sup> Cir. 1995).

<sup>23</sup> SD 9; NT 62.

<sup>24</sup> §14.162(f).

<sup>25</sup> *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

<sup>26</sup> *Ibid.*

<sup>27</sup> SD 2. The federal requirement can be found at §300.346(a)(1)(ii).

self-advocacy skills; improved generation, organization, and expansion of ideas in written form; improved checking for correct sentence structure, spelling, and developmentally appropriate conventions; improved reading fluency; improved attention and focus during large group instruction and independent seatwork; improved organizational skills; assistance with transitions; assistance with learning strategies for assignment completion; help breaking down long-term assignments into smaller chunks; support in note taking; and improved writing speed. An IEP that was reasonably calculated to provide meaningful educational benefit would address these needs through specially designed instruction, a behavior management plan, related services, curricular adaptations, and/or instructional accommodations. Moreover, that IEP would be implemented in the LRE.

### 2005/06 IEP

The IDEA sets forth in clear language that children eligible for special education services are to be educated within the regular classroom "to the maximum extent appropriate...."<sup>28</sup> As the Third Circuit explained in *Oberti*<sup>29</sup> a determination of whether a school district has complied with this inclusion, or mainstreaming, preference in the IDEA requires two considerations: (1) whether education within the regular classroom with supplemental aids and services can be satisfactorily achieved; and (2) if placement outside of the regular classroom is necessary, whether the school has included the child with non-exceptional children to the maximum extent possible.<sup>30</sup> In evaluating this first consideration, a court should look at the efforts the school district has made to include the child, a comparison of the benefits to the child of a regular classroom versus a separate special education classroom, and the effect on the other students.<sup>31</sup>

"A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum."<sup>32</sup> Student had been successfully educated in a regular education classroom with a variety of accommodations through the sixth grade. For the 2005/06 school year Student initially received academic instruction in an autistic support class.<sup>33</sup> The record contains no evidence that Student's IEP could not be implemented in a regular classroom with supports and services. There is no evidence that the District considered other placements. In short there is no evidence that the District complied with the

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<sup>28</sup> 20 U.S.C. § 1412(a)(5); see also 34 C.F.R. § 300.550.

<sup>29</sup> *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1216 (3rd Cir. 1993)

<sup>30</sup> 995 F.2d at 1215.

<sup>31</sup> *Id.* at 1216-17.

<sup>32</sup> 20 U.S.C. § 1412(a)(5).

<sup>33</sup> NT 157. In October 2005, the team mainstreamed Student for mathematics with parent approval. Student successfully participated in a pre-algebra mathematics class with his regular education peers without any modification to the curriculum, textbook, homework assignments or tests. Student was able to take his tests in the autistic support classroom and earned a B in math for the 2005/06 school year. NT 88,164-167,185-187.

Commonwealth's and federal requirements related to LRE.<sup>34</sup> The unnecessarily restrictive environment effectively reduced Student's opportunities to model the social skills of nondisabled peers as well as to generalize in the regular education environment the skills he should have been taught directly.

The District's actual program largely ignored Student's documented need for improved attention and focus.<sup>35</sup> Classroom observations by the School Psychologists indicated that Student was off task 68% of the time in Math class and 64% of the time in Language Arts. The 2005/06 IEP contains a behavioral goal that lists Student's responsibility: arrives on time, unpacks belongings, reads television [sic] and follows instructions, hands in homework and important papers, completes daily grammar assignment, completes "end of day job" copies assignments from assignment board exactly as they have been written, and completes "Friday Folder" (when assigned) and follows all directions. There are no goals for attention and focus during the class. The section of the IEP dealing with special education and related services has one entry dealing specifically with attention and focus. The specially designed instruction is "Refocus cues (ex: quiet tap on desk)."

Given these shortcomings in program and placement, we find the District did not offer FAPE at the beginning of the 2006/07 school year.

#### 2006/07 Proposed IEP

This proposed IEP identifies Student's needs to be in the areas of spelling, reading comprehension, written expression, organization, and attending to tasks. The proposed IEP contains the following goals. "In writing, based on the Pennsylvania Writing Assessment Domain Scoring Guide, [Student] will advance from a baseline of 13.5/20 to a score of 16/20 on informative writing pieces, and a score of 16/20 on persuasive and creative writing pieces." This goal is so vague as to be meaningless.<sup>36</sup> Moreover, the short-term objectives do not clarify the goal. For example, two dimensions of the scoring rubric have no objectives. The short-term objective that deals with conventions states that Student "will proofread his writing for proper conventions demonstrating evidence of control of grammar, mechanics, usage, and sentence

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<sup>34</sup> We note that the HO barred as irrelevant the parent's attempts to raise these issues during the hearing. See for example, NT 121/2.

<sup>35</sup> SD 2.

<sup>36</sup> The scoring guide is a rubric with which to rate student performance on five dimensions: Focus, Content, Organization, Style, and Conventions. Each dimension is rated on a four-point (clearly ordinal) scale. The verbal anchors for each of the four points are subjective. For example, the anchors for the four points of "Conventions" are (1) "Evident control of grammar, mechanics, spelling, usage, and sentence formation"; (2) "Sufficient control of grammar, mechanics, spelling usage, and sentence formation"; (3) "Limited control of grammar, mechanics, spelling, usage, and sentence formation"; (4) "Minimal control of grammar, mechanics, spelling, usage, and sentence formation." Obviously, the rubric offers no guidance in distinguishing among "evident control," "sufficient control," "limited control," and "minimal control." In addition, the overall score (a sum of five dimension scores) provide no guidance to a teacher or parent as to what will actually be taught. For example, Student's score of 13.5/20 could mean that he has "evident control" of conventions or "minimal" control of writing conventions.

formation.” Unfortunately, a reader cannot tell if the control is to be “evident,” or “sufficient,” or “limited,” or minimal.” The second annual goal deals with spelling. While it is quite clear what is meant by spelling with 90% accuracy, we have no idea of what words will be spelled accurately. On the third annual goal (answering inferential questions), the criterion level of performance on the short-term objective exceeds the criterion level for the annual goal. The fifth measurable annual goal is that Student “will increase auditory attention in the therapy and classroom settings with no more than 2 prompts per 45 minute lesson.” No baseline data are presented for the annual goal or short-term objectives. There is no indication how or how often auditory attention will be assessed in each 45-minute period. No annual goals address Student’s needs in organization or problems with visual attention.

Examination of the specially designed instruction reveals an instructional program that is not tailored to Student’s needs. For example, “Incidental Instruction” is listed as a method for teaching social skills. Clearly, if the student were capable of learning social skills incidentally, he would not require instruction now.<sup>37</sup> In addition, there is no indication that Student understands cues to refocus his attention or that all of his teachers will use the same cues consistently. Strikingly absent is a behavior management plan that uses positive techniques to shape and develop the attentional behaviors that are so needed. There is no evidence that the IEP teaches Student strategies for independent behavior and self-monitoring of attention or focus.

For these reasons, we find HO erred in finding that the IEP offered by the District was reasonably calculated to provide FAPE.

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<sup>37</sup> As far as this panel can determine, incidental instruction is a technique used in second language acquisition in which explicit instructions are not given. This panel knows of no empirical support to use this technique to teach social skills to students with Asperger’s Syndrome. If this term is used in a more generic sense, we note that incidental learning is a common area of weakness among students with autism. Thus, even in a general sense, incidental instruction is inappropriate.

## ORDER

Accordingly, this 23rd day of April, 2007, the Hearing Officer's order is in part affirmed and in part reversed. Any exceptions not addressed in this order are dismissed.

1. The Hearing Officer did not err in allowing the hearing to proceed.
2. The District did not offer an appropriate IEP for the 2006-2007 school year.

In accordance with 22 PA CODE Sec. 14.162(o), the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or the appropriate federal district court.

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John Salvia, D.Ed.  
for the Appeals Panel

Date signed and mailed: 23 April 2007