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SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL

COMMONWEALTH OF PENNSYLVANIA

**IN RE THE EDUCATIONAL ASSIGNMENT : SPECIAL EDUCATION
OF C.P., A STUDENT IN THE : OPINION No. 1741
COUNCIL ROCK SCHOOL DISTRICT**

**BEFORE APPEALS PANEL OFFICERS HEETER, LYTTLE AND MCAFEE
OPINION BY MCAFEE, APPELLATE OFFICER**

BACKGROUND

The xx year-old Student who is the subject of this appeal resides in the District and is currently classified under the Individuals with Disabilities Education Improvement Act of 2004 (20 USC 1400 et seq.) as a student with a specific learning disability (SLD) and other health impairment (OHI). (P-4; S-4) From preschool, Student experienced difficulty with attention, which continued throughout Student’s school career. (N.T. 1281- 1291; 1346-1351) Student was referred to the instructional support team (IST) in first grade and received supportive reading services in the general education classroom. (S-4) He continued in the general education program in second grade. For second and third grades, Student was placed in a so called “inclusion class.” (N.T. 1296-1299) Although the term “inclusion class” generally means a general education classroom with supplemental aids and services designed to meet the unique needs of a student with

disabilities, there is no evidence that the District identified Student's unique needs during this time, nor that the District provided services designed to meet Student's unique needs because the District did not conduct an individual evaluation to identify Student's needs.

In fourth grade, Student continued to encounter difficulties with attention and District still did not evaluate, nor seek to identify unique needs. In addition, in fourth grade, Student was not served in a so called "inclusion class."¹ During fourth grade, Parent initiated a private evaluation. The District again initiated IST, but did not initiate a multidisciplinary evaluation, instead indicating that it would rely on the Parent's evaluation and data gathered during IST. (N.T. 61-62, 169-170, 1382-1383; S-3, S-4) IST interventions applied during this time were not successful. (N.T. 174-176: S-3, S-4) In May 2002, the District requested and received permission to evaluate in order to review the private evaluation and construct an evaluation report (ER). (P-9) The private evaluator and the ER identified student with a learning disability and health impairment and in need of specially designed instruction. (P-2; S-4) The subsequent individual education program (IEP) called for placement in an inclusion program. (N.T. 1309-1311, 1337-1338; P-10) Student's 2003-04 (sixth grade) IEP identified needs in organization, writing, reading, comprehension, and handwriting. The IEP contained no present levels or goals in organization or handwriting. Student received instruction in a class with 24 students of which nearly half (11) had IEPs again indicating that District's "inclusion" practices are, in fact, segregation practices where the "inclusion class" has a

¹ This Panel must admit we are at a loss as to what the District means by inclusion class. If they refer to a specific general education class that is designated to receive students with disabilities, the practice would necessarily violate the least restrictive environment (LRE) provisions of IDEA because it would mean that "included students are not placed with their nondisabled peers in a nondiscriminatory fashion, but are placed in prespecified classes that are not representative of nondisabled peers. Such practice clearly violates nondiscrimination and LRE provisions because it limits "inclusive" placements to specific classes and specific nondisabled peers.

disproportionate number of students with disabilities, indicating that the students are placed in a discriminatory manner. (N.T. 258-262) Student's problems with attention and organization continued and extended to homework. Student's report card reflected continuing problems, which appeared to worsen. (S-1)

Student's seventh grade year continued to evidence problems with organization and achievement. Student was placed in a so called "resource room" which did not really function as a resource room (i.e., as a supplement to a regular class), but as a self-contained setting. (S-7, S-14) Student was also placed in an "inclusion class" for math, social studies and specials (art, music, etc.). The IEP contained no levels for written expression or organization, two of the major areas of concern. By October, Student's teachers requested a meeting with the Parents with concerns over completion of assignments, homework and distractibility. (N.T. 490-494; P-20) Writing problems also continued. (N.T. 498) Other problems continued throughout the year. (N.T. 104, 238-244, 490 – 511, 624, 997)

An IEP meeting was held on May 19, 2005. The Parent did not approve the proposed placement and IEP and sought a prehearing conference. Subsequently, at a July 12 meeting, Parents informed the District they were considering a private placement. On July 27, 2005, parents notified the District they were placing Student at a private school, which they did.

A due process hearing was held on November 1, 2, and December 5, 2005, and February 6, 7, April 10, 11 and 17, 2006. The Hearing Officer identified the following issues:

1. Did the [School District] offer [Student] a free appropriate public education [FAPE] for the 2003-2004 school year?
2. Did the [School District] offer [Student] a free appropriate public education for the 2004-2005 school year?
3. If the District did not offer [Student] a free appropriate public education for the 2003-04 and/or 2004-05 school years, is [Student] entitled to compensatory education, and if so, in what amount?
4. Did the IEP proposed by [School District] offer [Student] a free appropriate public education for the 2005-2006 school year?
5. If the IEP proposed by the [District] for [Student] did not offer him a free appropriate public education, are [Parents] entitled to tuition reimbursement for their unilateral placement ?
6. Are [Parents] entitled to reimbursement for the independent educational evaluation they obtained from Dr. []?

The Hearing Officer issued a decision on May 16, 2006 and ordered:

1. The [District] did not offer [Student] a free appropriate public education for the 2003-2004 school year.
2. The [District] did not offer [Student] a free appropriate public education for the 2004-2005 school year.
3. As the [District] did not offer [Student] a free appropriate public education for the 2003-2004 and the 2004-2005 school years, [Student] is entitled to compensatory education in the amount of five (5) hours per day for every day that [Student] was present in school from November 1, 2003 to the last day of school

in June 2005. The compensatory education is to be selected and governed according to the parameters out [sic] forth above.

4. The IEP proposed by the [School District] for Student for the 2005-2006 school year did not offer [Student] a free appropriate public education.
5. As the IEP proposed by the [School District] for [Student] for the 2005-2006 school year did not offer [Student] a free appropriate public education, [Parents] are entitled to tuition reimbursement for their unilateral placement of their son at the [Private] School.
6. Parents are not entitled to reimbursement for the independent educational evaluation they obtained from [Private evaluator].

ISSUES

The District filed Exceptions via a 43-page document dated May 30, 2006.

District's document details seven specific Exceptions:

1. The Hearing Officer erred in determining that Student's program for the 2003-2004 school year failed to provide FAPE.
2. The Hearing Officer erred in determining that Student's program for the 2004-2005 school year failed to provide FAPE.
3. The Hearing Officer erred when she awarded compensatory education to Student/Parents for District's alleged denial of FAPE during the 2003-2004 and 2004-2005 school years.
4. The Hearing Officer erred in awarding tuition reimbursement to the Parents.
5. The Hearing Officer erred to the extent that she based her decision to award compensatory education, tuition reimbursement or to find the District

witnesses not to be credible based upon the District's inability to produce Student's educational record in full.

6. The Hearing Officer erred when determining that the District's witnesses should not be considered credible any time that their testimony differed from Parents' recollection.
7. The Hearing Officer erred when precluding the testimony of the learning support teacher.

Parents, through Counsel, submitted answers to the District's Exceptions through a 23-page document dated June 5, 2006. Parents' Answers, not surprisingly assert no error on the part of the Hearing Officer and request that this Panel affirm the Hearing Officer's Decision.

For the sake of clarity, our discussion below will first address District's Exceptions on procedural issues- credibility determinations (Exceptions 5 and 6) and the Hearing Officer's refusal to hear the testimony of the learning support teacher (Exception 7). We will then address the appropriateness of the IEPs and programs offered or provided during 2003-04, 2004-05, and 2005-06 (Exceptions 1-4).

DISCUSSION

Scope of Review. In many previous decisions, this Panel has addressed its scope of review, as enunciated in *Carlisle Area School District v. Scott P.* 62 F.2d 520 (3d Cir. 1995), where the Third Circuit said:

"We thus hold that appeals panels reviewing the fact findings of hearing officers ... should defer to the hearing officer's findings

based upon credibility judgments unless the 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." 62 F.3d at 529.

The Hearing Officer in this case clearly considered the entire record and painstakingly enumerated the undisputed facts. We see no reason to set aside any of her findings of fact based upon the record as a whole or credibility judgments. Thus, our review is limited to the application of legal concepts and requirements.

Procedural Issues. District asserts that the Hearing Officer made credibility determinations incorrectly. Case law on this point is quite clear. Simply, this Panel must defer to the credibility determinations of the Hearing Officer unless a reading of the record as a whole, or the non-testimonial extrinsic evidence compels a contrary conclusion (*Carlisle, id*). A reading of the record as a whole clearly does not compel a contrary conclusion. Like the Hearing Officer we are struck by the inconsistency in District witnesses' testimony. District witnesses referred to meetings as IEP meetings, then recanted and declared that they were not IEP meetings; District witnesses often had no first hand knowledge of the Student. Documentary evidence (such as report cards), when it was available, clearly indicated that the Student was encountering continuing difficulty in school even when District staff testified that Student was doing well. Other specific contradictions within testimony, or between testimony and documents are pervasive in the record. In addition, we are struck by the lack of documentation produced by the District. Various, testimony indicates that documents were lost, destroyed, or perhaps temporarily misplaced. Such disorganization does little to enhance the credibility of the District especially in light of the numerous procedural errors such as the extended time student spent in IST without improvement or even systematic data collection, IEPs

that fail to meet the standards of IDEA, and consistent violations and seeming unfamiliarity with the concept of least restrictive environment that we mentioned in our introduction.

Not surprisingly, District cannot identify extrinsic evidence that would compel a contrary ruling; nor can District describe the factual basis for overturning credibility determinations on the record as a whole because neither basis exists. The credibility determinations of the Hearing Officer are affirmed. This Exception is denied.

District next asks this Panel to reverse the Hearing Officer in her ruling prohibiting the testimony of a learning support teacher who may have been Student's teacher for the current year had Student remained in the District. During the hearing, it appeared to be questionable as to whether the teacher would have been Student's teacher for 2005-06. However, teacher's status is immaterial because the issue was not who would teach the Student, nor even how a proposed teacher teaches his class and whether that would be beneficial to the Student. The issue was, "Is the proposed IEP for 2005-06 appropriate?" Qualifications of the proposed teacher and teacher's methodologies were not at issue. What was at issue was the content of the IEP and a history of alleged denial of FAPE. Interestingly, District's Exception on this point makes no specific case for how the teacher's testimony is relevant, nor what it would have contributed. This Exception is denied. The Hearing Officer's exclusion of the testimony of the learning support teacher was proper.

Compensatory Education and Reimbursement. Compensatory education is an in-kind remedy designed to provide eligible students with the services they should have received pursuant to FAPE and which their parents did not purchase as a replacement

Lester H. v. Gilhool, 916 F. 2d 865 (3rd Cir. 1990), *cert. denied*, 499 U.S. 923, 111 S.Ct. 317 (1991). A child is entitled to compensatory educational services if the child is exceptional and in need of special education and related services (i.e., eligible for FAPE) and, if through some action or inaction of the district the child was denied FAPE. Unlike reimbursement for private schooling or independent educational evaluations, compensatory education is due the child, not the parent. *See* PA Sp. Ed. Op. #1104.

Furthermore, we are obligated to determine if the program and placement offered by the District meet the procedural requirements of IDEA and are reasonably calculated to confer meaningful educational benefit. (*See Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (ED PA, 1996). The standard of “reasonably calculated to confer meaningful educational benefit” means that the IEP is based on a thorough evaluation and addresses all of the child’s needs. The District has a narrow and legally unsupportable position on the meaningful educational benefit requirement, implying that if the Student derives some benefit, in some area of need, compensatory education is not warranted. The plain language of IDEA and the *Rowley* and *Rose by Rose* decisions speak clearly to this issue.

Moreover, the IEP must be responsive to all of the needs identified in the evaluation. The District does not get to pick some needs, assert that its program was “reasonably calculated to confer meaningful educational benefit” or did provide meaningful benefit for those chosen needs and then claim that it has provided FAPE. FAPE requires a program that is reasonably calculated to confer meaningful educational benefit for **all** identified needs and for needs that **should** have been identified had an appropriate evaluation occurred. For all three years in question, the District’s IEPs clearly

did not address all of Student's needs. Most importantly, the IEPs offered and the services provided for 2003-2004 and 2004-2005 neglected the most pressing need- Student's pervasive problems with attention and organization. We find it deeply disturbing that District was so negligent as evidenced by District personnel blaming Student for organization and attention problems and placing the onus on Student (N.T. 490-491, 538-539, 1349-1350, 1357-1358, 1442-1443). District's Exceptions are more notable for what they don't say. They produce no evidence, nor do they assert that they provided a program to meet Student's needs in the areas identified by the Hearing Officer as deficient. Specifically:

1. For 2003- 2004, the IEP was essentially the same as the previous year, which evidenced minimal success in most areas and none in the area of greatest need. The IEP does not even identify attention and focus as needs. There are no goals or specially designed instruction for handwriting, another need. No evidence for "meaningful benefit" in the form of data was produced for the year. Finally, Student's report card clearly records a year of minimal benefit (see H.O. Decision @ 24-25).

2. For 2004-2005, the IEP perpetuated the same flaws as the previous year. In addition, the District unilaterally changed the Student's level of restrictiveness in placement in clear violation of the Student's and Parents' rights. Again, the District can produce no evidence of meaningful benefit in Student's primary area of need (attention and organization) because no evidence exists and because District did not provide a consistent, individualized system of instruction in the skills required. Again, it collected no data and did not monitor consistently, which is the core of a program for a student with attention and organization problems. (see H.O. decision @ 25-26).

Thus, District Exceptions on the matter of compensatory education for 2003-04 and 2004-05 are dismissed. The order of the Hearing Officer is affirmed. Student is entitled to five hours of compensatory education for each day of attendance for 2003-04 and 2004-05.

We now arrive at the final issue. District asserts the Hearing Officer erred when she ordered reimbursement for the unilateral private school placement. The Hearing Officer concluded, “The August 2005 IEP... was a superficially modified version of the May IEP with most of the failings [of]...the IEPs of 6th and 7th grades” (H.O. Decision @ 29). We agree. Again, the IEP fails to address Student’s primary need (organization and attention) in any measurable and systematic way. The District, having failed to appropriately address the Student’s need for the previous seven years in the District, proposed to perpetuate its unorganized, immeasurable, and unsystematic generic program. Parents, having duly notified the District of their intent to place Student in a private school afforded the District the opportunity to correct the flaws one more time. The District did not use the opportunity to make a correction. Instead, it chose the same path. Thus, the program offered for 2005-2006 fails to meet the criteria for an appropriate program. It is not individualized and it does not address the Student’s primary need.

District further asserts that Parents’ petition for reimbursement must fail because Parents failed to establish that the private school is appropriate. Like the Hearing Officer, this Panel must decide on the basis of the evidence put forth. In this case, the evidence is the testimony of Parents’ expert and District’s Special Education Director. The latter testified that the District could do “just as well” or better than the private school must lead us to the conclusion that District’s own witness considers Parents’ placement

appropriate, or at least more appropriate than the program offered by the District. The Director does not assert that the program actually offered is equal to or better, but that the District, given another opportunity could create one. The Parents and Student have waited for the District to create such a program for eight years. There is no compelling reason to make them wait yet another year. This Exception is denied.

ORDER

AND NOW, this 19th day of June, 2006, it is hereby ordered that the Decision and Order of the Hearing Officer are affirmed and hereby incorporated in their entirety. Exceptions of the District are denied.

In accordance with 22 PA Code § 14.64 (o) the parties are advised that this Order may be appealed to the Commonwealth Court of Pennsylvania or the appropriate federal district court.

James K. McAfee, Ph.D.
for the Appeals Review Panel

Mailing Date: June 19, 2006