SPECIAL EDUCATION DUE PROCESS APPEALS PANEL REVIEW
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT OF J.M., A STUDENT IN THE WALLINGFORD-SWARTHMORE SCHOOL DISTRICT	: : : :	SPECIAL EDUCATION OPINION NO. 1820

BEFORE APPEALS PANEL OFFICERS LYTTLE, McAFEE AND McELLIGOTT
OPINION BY LYTTLE, APPELLATE OFFICER

BACKGROUND

The xx year-old tenth grade Student who is the subject of this appeal resides in the District, is eligible for special education and related services pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA); and is currently attending an out-of-state private school ("private school"). *See* USC § 1400 *et. seq.*; FF1, 5, 6. Student's eligibility for services, as a student with specific learning disabilities, under IDEIA and 22 PA Code § 14 is not in dispute. Historically relevant, is the following:

In 8th grade (school year 2005-2006), Student was doing well academically, however behaviorally, Student began "evidencing self-injurious behaviors such as cutting [Student's] self. The Student continued to evidence self-injurious behaviors as a 9th grade student in 2005-2006…." FF23. These behaviors, and frequent related psychiatric hospitalizations, were known by the District.[1] FF12, 19, 22, 24, 32, 33, 34, 38, 39, 41, 43, 44. *Inter alia,* Student made visits to "the nurse's office on a [sic] *excessively*

[1] "Presenting behaviors associated with the placements included depression, self-injurious behaviors, hallucinations, and post-traumatic stress disorder." FF12.

frequent basis during the 2005-2006 school year." Stip. @ FF2; FF 38 (emphasis added by italics). The District provided some intermittent academic work to Student during spring 2006. FF30. The District believed Student's psychiatric placements in the spring of 2006 impacted Student's academic progress, so the District modified its traditional letter grading method, assigning pass/fail grades to accommodate Student's poor attendance and lack of competence in course requirements and objectives. FF 39, 41, 43. Student did not return to District classes after April 17, 2006, due to Student's emotional support needs, which were being attended to at out-of-school psychiatric facilities. FF44.

Although Student has an "extensive history of learning, emotional and psychiatric issues which have had an impact upon [Student's] academic progress"; between January and June 2006 ("spring 2006"), the District failed to call an IEP Team meeting to address Student's behavioral needs; even after a written request by the Parent to do so. FF 5, 11, 20-29, 30; *see also* H.O. Dec. @ 8.[2] Additionally, Student's Individualized Educational Programs (IEP) for school years 2005-2006 and 2006-2007 failed to include any specialized considerations under the category, "behavior that impede[s] his/her learning or that of others." FF 6, 13, 25, 32, 39, 41, 42. Moreover, the June 2005 IEP had expressly stated that Student was ineligible for summer 2005 ESY services; however, the June 2006 IEP was silent on the IEP team's consideration of, or Student's eligibility for, summer 2006 ESY services. FF 7, 13, 25, 32, 39.

At the end of the 2005-2006 school year, the IEP team did discuss the need for Student to receive instruction in the home which would focus on the 9th grade information and concepts Student failed to receive during the January to June 2006

[2] The Hearing Officer's Decision ("HO Dec.") is unnumbered. Reference to the HO Dec. is made hereto, beginning as page number one (1) with the first page of text.

school absences. FF 39. Rather, Student was enrolled by Student's Parent that summer, in the out-of-state private school currently at issue. FF 8, 18, 19, 22, 26, 27.

At the June 2006 IEP meeting, the District, even believing that Student's psychiatric placements impacted Student's educational progress, specified no baseline data against which to measure identified goals, nor did it address Student's emotional needs. FF 11, 13, 33; *see especially* FF34. The Parent informed the District of this private school summer placement in which Student was receiving primarily remedial courses to make up for the work missed in the District spring 2006. FF16,-19, 27. Upon receipt of this information, the District neither requested permission to evaluate, nor did it convene an IEP Team meeting to revise the IEP accordingly. FF 27, 28.

Parent believes that the District should have convened an IEP meeting during spring 2006 and revised the IEP to reflect and provide educational services in accordance with Student's then-current special needs, and, Parent argues, in not doing so, the District failed to provide Student FAPE. Parent also requests reimbursement of costs associated with the Student's programming provided in summer 2006, which Parent secured to remediate objectives and competences Student failed to master due to District's failure to provide FAPE during spring 2006. *See* FF 4.

A three session due process hearing, held March 1, 13 and 19, 2007 addressed the Parent's claims on the five following issues:

Issues

1. Was the Student offered FAPE during the period between December 2004 and June 2006?

2. Did the proffered IEP in June 2006 provide the Student FAPE?

3. Is the Student's placement at the [out-of-state private school] for the 2006-2007 school year an appropriate placement?

4. Is the Student entitled to tuition reimbursement for placement at the [private school] for the 2006-07 school year as well as for ESY placement at the facility during the summer of 2006?

5. Is the Student entitled to any compensatory education due to FAPE not being provided [Student] during the period between December 2004 and June 2006?

HO Dec. @ 6.

Two motions were denied by the Hearing Officer prior to the initial due process hearing session. FF 3. "One dealt with the proposition that the District's response to the Parent's due process request was untimely. The other dealt with which side had the burden of proof in these proceedings." *Id.* The Hearing Officer found, based upon *Schaffer v. Weast*, 126 S.Ct. 5.78, 5.37 (2005), that the Parent bore the burden of proof as the party who filed for the due process hearing. *See* HO Dec. @ 7.

On April 13, 2007, the Hearing Officer filed his thirteen page decision ordering the following:

Order

On this the 3rd day of April 2007, it is hereby ordered that:

1. The student was provided FAPE during the period between December 2004 and June 2006.

2. The student was not offered FAPE for the 2006-07 school year in the proffered IEP of June 2006.

3. The student's placement at the [private school] for the 2006-07 academic year constitutes an appropriate placement for [Student].

4. The student is entitled to tuition reimbursement for the 2006-07 academic year at the [private school] commencing with the beginning of the regular school term in September 2006.

5. The student was not eligible for ESY services during the summer of 2006 and the parent is not entitled to tuition reimbursement for academic programming at the [private school] prior to the beginning of the regular school term in September 2006."

6. The student is not entitled to compensatory education of any sort as [Student] was provided FAPE by the District during the period between December 2004 and June 2006.

HO Dec. @ 13.

ISSUES PRESENTED

The Parent filed the following Exceptions to the Hearing Officer's Orders Numbers 1, 5 and 6:

1. The Hearing Officer erred in failing to find a denial of FAPE and award compensatory education for the period January – June 2006.

2. The Hearing Officer erred in failing to find a denial of FAPE in the District's failure to include ESY in the June 7, 2006 IEP, and in failing to award compensatory education or tuition reimbursement for ESY for the Summer of 2006.

3. Where the District's answer was both untimely and inadequate under the applicable statute and regulations, the Hearing Officer erred in refusing to deem the averments in Parent's Due Process Complaint Notice admitted, or, in the alternative, to require the District to assume the burden of proof.

P's Ex. @ 1. As no other Exceptions were filed; the Hearing Officer's Orders Numbers 2, 3 & 4 stand as written.

On April 26, 2007, this Panel received, and denied, District's request for "… a 30 day extension to file the District's Answer…." On April 30, 2007, District filed its two-page Answer stating, in essence, the Exceptions should be denied and the Hearing Officer's Orders concerning tuition reimbursement should be revised or reduced.

On May 7, 2007, the Panel received a Motion from the Parent to dismiss sections D and E of the District's response as an attempt, on the part of the District, to "belatedly interpose exceptions, and seek relief outside of, and unrelated to, Parent's clearly circumscribed exceptions."

We find that the District's Answer is just that, a response to Parent's Exceptions, as any argument which appears to constitute an Exception would be deemed untimely filed and dismissed accordingly.

DISCUSSION

Scope of Review

Our analysis begins with the Appeals Panels' scope of review, as enunciated in *Carlisle Area School District v. Scott P.*, 62 F.2d 520 (3rd Cir. 1995), where the Third Circuit stated:

> 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.

In *In Re The Educational Placement of R. S.*, Sp. Ed. Op. #950 (1999), we analyzed this controlling precedent and held that:

> Of critical import is the Hearing Officer's use of pervasive, predominant, or overall, denoting general record support for his conclusions without denying the existence of such facts inapposite as parents cite. In those modifiers obvious credibility determinations exist which, since a whole record review or non-testimonial extrinsic evidence in it does not compel contrary conclusions, we can not reverse. Similarly, the remaining parental Exceptions must also fail as they too would have us overturn credibility based determinations in the absence of a finding of record support for doing so. Emphasis by underline added; *see also id.*

The point here, of course, is not whether the modifiers used by the Hearing Officer in *R. S.* are present in the current matter, which they clearly are not, rather, it is that every Hearing Officer is empowered to make determinations, *inter alia*, as to evidentiary weight and credibility, and the record need not be devoid of contrary evidence. Thus, this is the import of *Carlisle's* holding, that Appeals Panels can reverse only when the whole record or non-testimonial extrinsic evidence compels a contrary conclusion.

In the present matter, measured against this standard, this Hearing Officer's Conclusions of Law, Decision, and Order must be affirmed in part and modified in part.

Compensatory Education

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. *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. Thus, a District is obligated to provide compensatory education when it fails to provide FAPE to an eligible student.

In the present case, in finding that the District's IEP failed to provide FAPE for the Student's 2006-2007 school year, he stated, "substantive elements lacking in the proffered 2006-07 IEP as written pale in comparison to the neglect of the IEP to appropriately address all of the Student's needs for FAPE." HO Dec. @ 8.

The Hearing Officer's analysis is instructive here as we consider the District's provision of FAPE for spring 2006. The Hearing Officer states the following:

> The record clearly indicates that the Student has had an extensive history of educational and psychiatric needs (FF5, 8, 12, 24, 32). [During spring 2006,] the Parent was in constant contact with District staff concerning traumatic events in the Student's life (FF24, 33) and the District was acutely aware of the series of psychiatrically related placements the Student had incurred during the [spring] semester of the 2005-06 school year at the time the IEP

Team convened in June 2006 to discuss the development of the Student's IEP for the 2006-2007 school year. FF24-25, 32-33.

While somewhat understandable as will be noted below, it still defies this Hearing Officer's understanding as to how the IEP Team in June 2006 could not have addressed the Student's social-emotional needs and considered how these substantial needs might impact [Student's] academic achievement in the coming academic school year. FF6. Indeed the District's own school psychologist testified that an in-patient hospitalization for psychiatric treatment would impact a student's education. FF34. Another District school psychologist indicated that IEP Teams, when cognizant of a student having been in psychiatric placements, should request such reports concerning these placements as part of the IEP development process. FF43. The District in this instance did not make such requests even though they were aware of the Student's placements in psychiatric facilities. Indeed, at the time of the IEP meeting in June 2006, the Student had not been in school since April 17, 2006 (FF44), and staff were aware of the reasons for [Student's] absence. FF29-30, 32-33. Additionally, testimony indicated that the Student's placements had, in fact, had an impact on [Student's] academic achievement. FF41. Still, the IEP Team neglected to consider the Student's social-emotional needs and how they might impact [Student's] academic progress.

The District argues that, even though they were aware of the Student's in-patient psychiatric placements, the behaviors prompting these placements were not being evidenced in the school setting. FF36. That may well be the case, but, as noted above, *the District's own psychologists acknowledged that events in a student's life cannot be compartmentalized and should at least be considered by the IEP Team.* The IDEA at 20 U.S.C. § 1414 (d) (4) (A) ii states that an IEP must be revised as appropriate to address, among other things, a student's anticipated needs or other matters (emphasis added). I cannot see how the litany of psychiatric placements in the spring of 2006 would not have compelled the IEP Team to consider any anticipated needs on the Student's part due to these placements. The determination of the reasonableness and appropriateness of an IEP is assessed in the context of the IEP Team using the information available to it at the

> time of the IEP meeting. Special Education Opinion #1731 (2006). The District failed this test.

Id. @ 8-9. We agree, and find, furthermore, that the Record is replete with evidence and testimony that, between January and June 2006, the District knew Student was suffering academically as well as emotionally, and the District had a legal obligation, pursuant to IDEA, to convene an IEP meeting, even before the Parent's request for one (which the District denied), to revise the IEP program to effect Student's educational progress.

The Hearing Officer continues:

> Finally, the District seemed to suggest that, since the Student had not been diagnosed as ED, social-emotional considerations were unwarranted. FF37. While certainly seeing some general connection between a student's IDEA diagnosis for entitlement to special education and the corresponding services a student would receive, I am unaware of any statute or regulation that would render any necessary service or intervention required for a student to receive FAPE to be made contingent upon that student's IDEA disability classification. Quite to the contrary, whether an IEP is considered as adequate and as providing an appropriate and meaningful education in addressing a student's unique needs is not predicated upon or dependent upon the specific IDEA related diagnosis that may have been accorded to the student.
>
> For all the above reasons, it is held that the District did not offer the Student an appropriate IEP for the 2006-07 school year.

Id. Again, we agree with the Hearing Officer, and expand his analysis and conclusions to include spring 2006 as well. Helpful, too, in the present case, is the Parent's Exception's analysis and argument regarding the spring 2006 compensatory education request. The Parent states the following:

> **A. The Hearing Officer Erred in Failing to Find a Denial of FAPE and Award Compensatory Education for the Period January – June 2006.**

> The record amply supported, and the hearing officer found, that "student's psychiatric placements in the spring of 2006 had an impact on [Student's] grades." Finding of Fact (FF) 41. However, the hearing officer concluded that the failure to re-write student's IEP and program for student did not result in a denial of FAPE during the period January – June 2006, because "the student was not available to the District". Hearing Officer Decision (Decision) p. 11.[3] This is both inaccurate and irrelevant. In all [Student's] placements, both in-patient and partial hospitalization, student was at all times between mid-January 2006 and the end of the District's academic year, in placements known and accessible to the District. Yet, the District never sought to convene an IEP meeting to revise the IEP to reflect student's then current needs and situation. Moreover, it is hardly uncommon for a school district to write an IEP which will be implemented in another setting, ranging from an in-home placement to a residential facility.
>
> The fact that the District did not have day-to-day in-school access to the child is not a free pass to disregard the responsibility to provide FAPE. Nor does a purely paper change of [Student's] grades from letter grades to pass/fail have any meaning for whether the student was receiving FAPE. The fact is that the District's own records, in the form of the June 22, 2006 end of the school year report card, show that student received grades of incomplete in both Science and Western Civilization. Incompletes in two major academic courses hardly qualifies as FAPE.[4]
>
> Nor did the District make any effort to provide for [Student] during the time [Student] was in school during that semester. No IEP meeting was convened, and no action was taken to address [Student's] emotional needs. Indeed, the record indicates that when one of the program representatives endeavored to coordinate student's program to provide emotional support services in the school setting, the school failed to either coordinate with this provider, or revise the IEP and provide the services itself. T425-431.

[3] Although the Decision pages are unnumbered, this memorandum will refer to the pages by the number in which they appear in the Decision, exclusive of the cover page.

[4] The documents from the District also include a mysterious, different version of the report card, generated after the filing of the due process complaint notice, which even reflected a different science teacher than the one student had. No satisfactory explanation was ever offered for this document, nor was there any testimony about either of these two courses and their grades.

Moreover, although the math teacher claimed that student earned a B in her course, which ended in January, her testimony that student took the final exam (T.595) cannot be reconciled with the math teacher's e-mail to student's [Parent] that student would not be taking the final exam, and would instead be graded on [Student's] work prior to [Student's] early January hospitalization. T605-607, P466. Further, as regards math and whether student received FAPE in this area of [Student's] identified learning disability, the grade and the student's facility in math, as claimed by the math teacher, cannot be reconciled with the undisputed findings in the testing. The testimony of the math teacher was that student had no difficulty in math class (Hearing Transcript (T), p. 586) and got one of the better grades. T. 596. However, the IEP under which student was operating indicated that "math remains [Student's] greatest challenge". Moreover, according to the Woodcock-Johnson test administered in July 2006, this January 2006, B student in college prep math [sic], tested low in math calculation skills and math reasoning. T91-93, P 248. Likewise, in a July 2006 psychiatric assessment, [Doctor] reported that student did all calculations incorrectly. T. 348, P 240. These results are hardly consistent with the rosy picture painted by the math teacher.

Finally, it is clear that student should have been identified as emotionally disturbed during the Spring 2006 semester, if not sooner. In particular, student fit into the emotional disturbance identification because, as the record establishes [Student] engaged in inappropriate types of behavior or feelings under normal circumstances and [Student] tends to develop physical symptoms of fears associated with personal or school problems which markedly affect [Student's] educational performance.

The position of the District is that, notwithstanding all [Student's] in-patient and partial hospitalization placements, student was doing fine when [Student] was in school. Accordingly, they offered, [Student] was not identifiable as emotionally disturbed. This District argument: 'Well, [Student's] emotional disturbance may have made [Student] miss most of a semester of school, but [Student] was fine when [Student] was here', is simply silly. If [Student's] emotional disturbance is keeping

> [Student] out of school, then it is affecting [Student's] educational performance, and requires proper identification and planning in an IEP.
>
> The District's claim is not even valid if its constricted view -- fine when [Student's] here -- were indeed legitimate. Student's grades and performance, as discussed above, clearly demonstrate that [Student's] education was being impacted. Moreover, the evidence is that this student was in the nurse's office 26 times during the first semester, and 27 of the 39 days [Student] was in school during the second semester, sometimes several times in a day. T648-651, 517-518. Certainly, all this time out of class is having an impact on [Student's] education.
>
> Accordingly, it was error for the Hearing Officer to fail to order any compensatory education for the period January through June 2006.

P's Exceptions @ 4-6. We agree with the Parent; and find that the District denied Student FAPE during spring 2006.

Having found denial of FAPE by the District during spring 2006, an award of compensatory education is appropriate such that Student is entitled to receive the programming which the District failed to provide. Parent seeks reimbursement for costs of services Parent provided Student through the out-of-state placement. We award Parent the tuition reimbursement sought for the summer programming. Although the District acknowledged Student required tutoring services over the summer 2006 to remediate programming lost, the District failed to fulfill its promise. As such, Parent enrolled Student in specialized programming at a private facility and is entitled to reimbursement of the tuition paid.

We do not, however, find that Parent showed that Student was eligible for, or entitled to, ESY services in summer 2006, as requested in Parent's second Exception.

The Hearing Officer's denial of ESY compensatory education and tuition reimbursement was proper. The Parent's second Exception is denied.

Similarly, the Parent's third Exception, requesting remedies for District's alleged tardiness in answering Parent's complaint, is denied. As this Panel has found in Parent's favor concerning the foremost issue of this Appeal, we find the third Exception moot.

Accordingly, we enter the following:

ORDER

The Decision and Orders numbers 2-4, of the Hearing Officer, are affirmed as written:

> 2. The student was not offered FAPE for the 2006-07 school year in the proffered IEP of June 2006.
>
> 3. The student's placement at the [private school] for the 2006-07 academic year constitutes an appropriate placement for [Student].
>
> 4. The student is entitled to tuition reimbursement for the 2006-07 academic year at the [private school] commencing with the beginning of the regular school term in September 2006.

HO Dec. @ 13.

The Decision and Orders numbers 1, 5, 6 of the Hearing Officer, are modified as follows:

> 1. The student was provided FAPE during the period between December 2004 and December 2005. The District denied Student FAPE during the period between January 2006 and June 2006.
>
> 5. Student was ineligible for ESY services during the summer of 2006, and the Parent is not entitled to tuition reimbursement as ESY programming.

6. Whereas the District failed to provide Student with FAPE during the period between January 2006 and June 2006; Parent is entitled to reimbursement of costs paid in association with the private school remedial programming Parent provided for Student during the summer of 2006.

All Exceptions neither expressly mentioned nor addressed herein are hereby dismissed.

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 to the appropriate federal district court.

Constance Fox Lyttle

Constance Fox Lyttle, Ph.D., JD
for the Appeals Review Panel

Electronic Mailing Date: May 23, 2007

U.S. Postal Service Mailing Date: May 24, 2007