THE SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL

COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT OF C.R., A STUDENT IN THE SCOTLAND SCHOOL FOR VETERANS CHILDREN	: : :	SPECIAL EDUCATION OPINION NO. 1772

BEFORE APPEALS PANEL OFFICERS LESHINSKIE, NEVANT & ZIRKEL
OPINION BY ZIRKEL, APPELLATE OFFICER

BACKGROUND

Originally established by Pennsylvania's legislature in 1893 under a slightly different name[1] Scotland School for Veterans Children (hereinafter referred to as the "School") is a residential school serving approximately 300 students in grades 3-12.[2] The primary funding sources are the state government and, via tuition recovery transfers, the Pennsylvania school districts from which the students come.[3] In 1996, the state legislature changed the supervising agency from the Pennsylvania Department of Education ("PDE") to the Department of Military and Veterans Affairs ("DMVA").[4] It is located within the boundaries of but has no formal relationship to the Chambersburg School District.[5] Its 40-45 teachers are all PDE-certified, although none in special

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[1] Its original name was the Scotland Soldiers' Orphans Industrial School. In the late 1890s, the admission requirements changed to include destitute, not necessarily orphaned, children of Pennsylvania veterans. In the early 1990s, the School's focus changed from vocational/trade to college preparatory education. *See, e.g.*, Noted Transcript ("NT") at 33-34. In recent years, almost all of the graduates have gone on to postsecondary education. *Id.* at 36-37. For its currently applicable legislative basis, see 24 P.S. §§ 2681-2703.

[2] *See, e.g., id.* at 40-41; School exhibit ("S")-8, at 6.

[3] *See, e.g.*, NT at 49 and 63-66. State funds and local tuition recover accounted for approximately 77% and 18% of the School's 2004-05 budget, respectively. S-8, at 1. The School receives federal funds under various U.S. Department of Education grants, including Titles I (remedial education), 2 (teacher enhancement), and 5 (innovative education) and Drug Free. *Id.*; NT at 65. Supplementary funding sources include ROTC and a private foundation. NT at 65 and 67. The School does not receive any special education funds. *Id.* at 69.

[4] *See, e.g., id.* at 35; S-9, at 48-49. While DMVA conducts the overall audit, PDE still audits specially funded activities. Parent exhibit ("P")-43; P-45. [N.B.: We renumbered the "ROB" page number exhibits in the record to fit our customary pattern.]

[5] *See, e.g.*, NT at 82. The faculty who live on campus or otherwise in Chambersburg send their children to that district's schools. *Id.*

education, and they participate in the state teachers retirement system.[6] The School contracts the services of a school psychologist from the Lincoln Intermediate Unit.[7] The School provides its students with school uniforms, food, housing, trips, and their education at no expense.[8] The School submits various reports to PDE that are required of school districts.[9] The governor appoints its board.[10] Within age and other eligibility criteria set by the legislature,[11] the admissions committee selects applicants from Pennsylvania school districts based on a process that includes a pre-admission questionnaire and an admission application.[12]

The Student resides with the Parents[13] in the Philadelphia City School District, where he was enrolled through grade 5.[14]

In January 2005, when he was in grade 5, he applied for admission to the School. His pre-admission questionnaire included "no" answers as to whether he had ever been enrolled in special education or had an IEP.[15] On 7/29/05, the School notified that Parents of the Student's selection for admission.[16]

On 8/17/05, the Student started grade 6 at the School.[17] On 10/31/05, based on

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[6] *Id.* at 42-44.
[7] *Id.* at 45.
[8] *Id.* at 62-63.
[9] *Id.* at 72-73. The data includes PSSA testing. *Id.* The resulting PDE compilations include the report card for public schools. P-32. Yet, the reporting does not extend, for example, to special education data.
[10] NT at 47.
[11] *Id.* at 40 (citing 24 P.S. § 2696).
[12] S-3, at 1; NT at 53-53. Approximately 80% of the students come from the Philadelphia School District. NT at 50; S-2. The pre-admission questionnaire includes items as to whether the applicant had ever been in special education or had an IEP. S-3. The application includes progress reports from the sending school district that verify the information regarding special education. NT at 57-59; S-6. The primary reason for these items is to determine whether the School can, within its present staffing, provide the degree of accommodation specified for the student. NT at 58-59 and 94. They do not serve as an automatic exclusion or controlling factor, although the School does not have—nor has it served within the current superintendent's knowledge—any students with IEPs or identified learning disabilities. *Id.* at 92-97 and 102.
[13] This Opinion refers to the "Parents" generically; even though the Student's mother took the more active role, she was apparently representing the Student on behalf of both her and her husband.
[14] P-8; P-10: NT at 70. During this prior period he attended at least one charter school. P-9.
[15] S-3, at 2.
[16] P-13.
[17] Hearing Officer Exhibit ("HO")-3, at Stip. 2.

the Student's academic—not behavioral[18]—difficulties,[19] the School obtained the Parents' permission for an evaluation.[20] The resulting 1/11/06 evaluation report ("ER") included a WISC-IV full-scale IQ score of 82, WIAT-II standard scores ranging from 68 in written language composite to 84 in numerical operations, and a recommendation that the Student was eligible for special education under the classification of specific learning disability ("SLD") in written expression and reading.[21] However, the School did not provide the Parents with the ER until early March.[22] On 3/10/06, the School's multi-disciplinary team, including the Parents, met via teleconference to discuss the ER.[23] During the meeting, school officials informed the Parents that the Student was eligible for special education and advised her, due to the School's staffing limitations, to withdraw the Student from the School.[24] The School did not prepare an IEP for him, and the Student left the school on 3/15/06.[25]

On or about 6/13/06, the Parents filed for a due process hearing.[26]

On 8/14/06, after conducting a hearing on 8/3/06, the hearing officer issued his decision, concluding that the School was a local education agency ("LEA") under the IDEA and, thus, violated its FAPE obligation to the Student.[27] He ordered the School to

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[18] NT at 106-07.

[19] *See, e.g.*, P-16.

[20] P-19. The contracted school psychologist conducted the correspondence under the School's letterhead. *Id.*

[21] P-22. The specific WIAT-II scores in written expression, reading comprehension, and decoding were 68, 71, and 77, respectively. Moreover, his standard score in reading on the Woodcock-Johnson Tests of Achievement III was 76. Thus, the purported severe discrepancy in reading in subject to question. Additionally, the ER provided recommendations based on "a possible to a significant problem on the overall Conners' ADHD Index." *Id.* at 10.

[22] HO-3, at Stip. 10.

[23] The parties mutually agreed to this procedure after the Parents had mechanical difficulties with their car. *Id.* at Stip. 12.

[24] *Id.* at Stip. 14.

[25] *Id.* at Stips. 15-16.

[26] HO-2.

[27] Hearing Officer Decision, at 8-10. The gist of his reasoning was that 1) the IDEA's definition of LEA is broad, extending to any "political subdivision of a State or ... any other public institution or agency having administrative control and direction of a public elementary school or secondary school" (*id.* at 7, citing 34 C.F.R. 300.28); 2) Pennsylvania's legislation concerning the School and its regulations for the IDEA are unclear (*id.* at 8-9, citing, e.g., 22 PA. CODE § 14.103), and 3) in such circumstances the practices of the school and treatment of various state agencies lack persuasive effect (*id.* at 9).

provide 54 hours of compensatory education to the Student and to convene an IEP team within two weeks to develop an IEP.[28]

The School timely filed exceptions.

DISCUSSION

As a threshold matter, we deny the School's request to provide additional evidence. The School does not come close to meeting the established standards for justifying this exercise of our discretion.[29] The catchall request for the addition of "testimony from the Department of Education, federal programs and non-public/private programs divisions of [PDE] any other state education programs the [appeals panel] may select" and testimony from the Lincoln Intermediate Unit obviously lack specificity, relevancy, and cogency. Moreover, if this case is as significant as the School contends, there is no reason that it could not have arranged for such testimony at the first level. If the School seeks judicial review, the court may—or may not—exercise different standards.[30]

The School's first two exceptions are challenges to the hearing officer's factual findings. All amount at most to harmless error. First whether the Student "is" in seventh grade, as the hearing officer found, is merely a matter of the 8/14/06 decision, which is obviously between the Student's sixth and seventh grade. It does not seem to be in error, and, even if it were, the effect is entirely harmless. Second, whether a purpose of the School's admissions process items concerning previously identified special education needs was, at least inferably, to recommend an alternative placement if these needs

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[28] His calculus included an estimate of a reasonable rectification period, yielding a starting point of 3/12/06, and an estimated deprivation of one hour per day for SLD services, yielding 54 hours for the duration of the 2005-06 school year. *Id.* at 11.

[29] *See, e.g.*, Special Educ. Opinions Nos. 1704 (2006), 1535 (2004), and cases cited therein.

[30] *See, e.g.*, Andriy Krahmal, Perry Zirkel & Emily Kirk, *"Additional Evidence" under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 TEX. J. C.L. & C.R. 201 (2004).

exceeded the School's current capabilities, as the hearing officer found, is similarly of no consequence to his conclusion concerning the controlling issue in this case.[31]

The third and fourth exceptions assert that the hearing officer failed to include factual findings and legal conclusions concerning the School's jurisdictional challenge. These exceptions similarly border on being frivolous, since it is obvious that the School's jurisdictional arguments amount to the controlling issue in this case,[32] which is whether the School is a local educational agency ("LEA") under the Individuals with Disabilities Education Act ("IDEA").[33]

The issue is addressed in the remaining exceptions, which basically reiterate the School's initial and closing arguments, including its threshold jurisdictional motion, to the hearing officer. Rather than respond to each exception in seriatim, we provide our own ordered analysis of the issue.

First, the IDEA's definition of an LEA remains, in relevant part, unchanged in the applicable legislation; the 2004 amendments, effective 7/1/05, repeated without revision the following language;

> A public board of education or **other public authority legally instituted within a State for either administrative control or direction of**, or to perform a service function for, **public elementary or secondary schools in a** city, county, township, or other **political subdivision of a State . . . .** [34]

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[31] In any event, in the Background section of this Opinion we provide our own factual foundation, with due deference to the hearing officer's findings within the applicable boundaries, which are limited to credibility-based factual findings. *See, e.g.*, Special Educ. Opinion 950 (1999) (citing Carlisle Area Sch. Dist. v. Scott P., 62 F.2d 520, 528-29 (3d Cir. 1995)).

[32] The School did not make any claim that if the IDEA applied that it had met its obligations thereunder, thus effectively eliminating any addition to the ultimate issue on the merits.

[33] As is customary for the panel's context, the reference to IDEA here includes the corollary state law—Pennsylvania's chapter 14 regulations. At the same time, it is well established that we do not have authority to review the parties' Section 504 arguments. *See, e.g.*, Special Educ. Opinions Nos. 1736 (2006), 1724 (2006), and cases cited therein.

[34] 20 U.S.C.A. § 1402(19) (2005) (emphasis added).

The hearing officer observed that both the former and new IDEA regulations recite this same language, with the clarification that it extends to "any other public institution or agency having administrative control and direction of a public elementary school,"[35] but the broad scope of the definition is amply evident in the stronger status of the legislative definition. Moreover, reflecting the wide breadth of this definition, the only exclusions that published court decisions have found were for entities that, unlike the School, were clearly private.[36]

The School argues, without clear support, that it is not a "political subdivision." However, examination of the IDEA definition of LEA reveals that the question is whether the School is "other public authority," beyond a board of education, that controls or provides specified educational services. The reference to political subdivision is for the location, not source, of such services.[37]

Similarly, the School's claims that it is not a school district are off point. The issue is whether the School is an LEA, which obviously includes but extends beyond school districts under not only the IDEA but also Pennsylvania's corollary regulations under Chapter 14.[38]

The School's arguments that Chapter 14 eliminates its coverage as an LEA are, on balance, unpersuasive for two interrelated reasons. First, it is not at all clear that state law may subtract from the coverage of the IDEA in areas where this federal statute does not expressly allow for such variance.[39] Second, even if a state may subtract from the coverage of the IDEA, it would, as a matter of waiver specifically or federalism

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[35] 34 C.F.R. § 300.18(b). In the 2006 regulations, which are effective 10/12/06, the codification is 300.28(b).

[36] *See, e.g.*, Ullmo v. Gilmour Acad., 273 F.3d 671, 679 (6th Cir. 2001); St. Johnsbury Acad. v. D.H., 240 F.3d 163, 172 (2d Cir. 2001)

[37] "Location" in this context could be physical, as in Chambersburg School District, or, more likely here, organizational, as in the DMV.

[38] *See infra* note 42 and accompanying text.

[39] It is undisputed that state law may add to the protections for students with disabilities, as Chapter 14 does for students with mental retardation. For subtracting coverage, which amounts to or taking away protection, the IDEA expressly provides for selected situations for variance, exemplified by the provisions for the evaluation and limitations periods. 20 U.S.C.A. §§1414(a)(1)(c)(i)(I) and 1415(b)(6)(B) (2005).

generally, have to do so clearly; yet, the Chapter 14 regulations expressly incorporate by reference the federal definition of LEA[40] for the express purpose of protecting the IDEA rights of children with disabilities[41] and then—cryptically—adds an interfacing provision that "[w]here the Federal provision uses the term 'local educational agency,' for purposes of this chapter, the term means an intermediate unit, school district, State operated program, or facility or other public organization providing educational services to children with disabilities ... [including] public charter schools...."[42] As the hearing officer correctly observed, it is not at all clear whether this interfacing provision was intended to limit the referenced units, including state-operated programs, to those already serving students with disabilities or to merely point out their FAPE obligation when faced with students with disabilities. If anything, the latter interpretation is more likely, given the express coverage of the relatively new public charter schools, which since their creation may not yet have served children with disabilities but obviously are not excused from the FAPE and other obligations under the IDEA.[43]

The School's "legislative history" arguments,[44] which are based on various documents and practices, including the state plan for special education, do not change our conclusion for several reasons. First, even if legislative history was sufficient in such circumstances to supply the required clarity, Chapter 14 is regulation, not legislation. Second, even if Chapter 14 were somehow stretched to equate to legislation, none of the documents and practices fit the generally understood definition of legislative history.

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[40] 22 PA. CODE § 14.102(a)(2)(iii).

[41] *Id.* § 14.102(a)(1).

[42] *Id.* § 14.103. For a partially analogous situation, see Special Educ. Opinion No. 1310 (2002) (state regulations ambivalent concerning IDEA coverage).

[43] Thus, although we agree as a matter of the merits with the hearing officer's conclusion that state law is unclear at best, we do not agree as a matter of dicta with his conjecture that state legislation or, by extension, state regulations would cure the problem. If the supposed correction were clear but only cosmetic, the possible problems would include notable issues of 1) preemption (*supra* note 39); 2) special legislation, *cf.*, Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994); and 3) semantic "ducking," *e.g.*, Tidelands v. Patterson, 719 F.2d 126, 129 n.3 (5th Cir. 1983).

[44] The exceptions refer to "the history of the state legislative intent."

Third, even in the loosest use of this term, the referenced practices are conflicting,[45] and the state plan is not an actual or necessary part of the record of this case.[46]

Finally, the School's arguments about its public school status are contradictory and of no moment. In its exceptions, the School contends that it "never argued it was not a 'public school.'" Yet, in its opening brief, the School argued that it "is not a public school in spite of being a state owned school."[47] Moreover, Pennsylvania's legislature has expressly treated the School at least for certain purposes as a "public school."[48] Regardless, the issue is whether the School is an LEA, not a public school, under the IDEA.

It is our considered conclusion that although the School is an unusual, although not "truly unique,"[49] public entity, which Congress did not specifically have in its institutional mind when enacting the IDEA, it fits within the clearly broad language in the applicable definition of LEA. The School does not except to, and thus, we do not raise and resolve other issues, such as the calculation of compensatory education.[50]

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[45] *Compare* P-47 (federal NCES report characterizing the School as a "state district"), *with* P-39 & P-41 (PDE reports characterizing it as an LEA). The School's own reports are similarly unclear. *See, e.g.*, P-15 ("for some purposes, a 'public school entity,' ... not a public school").

[46] Even if the state plan were part of the record, it is not—contrary to its characterization in the exceptions—part of Chapter 14 and subject to "statutory construction rules and cases."

[47] Brief in support of summary judgment motion, at 6. The brief also argues that the School is also neither a nonpublic school nor a private school/academy. *Id.* at 6-7. Instead, the School makes the tentative and inevitably unavailing attempt at not being a school at all, concluding: "Perhaps more appropriate for Scotland School is the analogy to non-resident inmates of children's institutions found at 24 P.S. § 13-1306." *Id.* at 7.

[48] 24 P.S. § 8102 (Public School Employees Retirement Code). Its legislative characterization is otherwise varied but, for our purpose, neither this version nor any of its variants is inconsistent with the School being a "public authority legally instituted within a State for either administrative control or direction of ... public elementary or secondary schools." *See, e.g.*, 24 P.S. § 12-1205.2(o) and 15-1501-C ("school entity" for teacher certification and educational support services); 24 P.S. § 19-1926 ("State-owned institution" for teacher tenure).

[49] NT at 20. A closely similar example in the record is the Indiana School for Soldiers' and Sailors' Children's Home. NT at 80-81; *see also* http://www.in.gov/isdh/issch/index.htm. A perhaps sufficiently similar entity, albeit at the postsecondary level, is Pennsylvania's Thaddeus Stevens State School of Technology School. *See, e.g.*, 24 P.S. § 8102. Admittedly, the School is unique as is the Student in this case. However, even if not fitting well, but for purposes of the IDEA, the School must fall on one side or the other of the line demarcated by the boundaries of an LEA; it is not somehow exempt from this determination.

[50] *See, e.g.*, Neshaminy Sch. Dist. v. Karla B., 26 IDELR 827 (E.D. Pa. 1997); Mifflin County Sch. Dist., 800 A.2d 1010 (Pa. Commw. Ct. 2002).

ORDER

Accordingly, this 15th day of September 2006, the Panel, by a unanimous decision, affirms the hearing officer's orders.

In accordance with 22 PA. CODE §14.162(o), we advise the parties that this Order may be appealed to the Commonwealth Court of Pennsylvania or the appropriate federal district court.

Perry A. Zirkel
for the Appeals Panel

Date signed: 9/15/06
Date mailed: 9/15/06