SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT OF S.K., A STUDENT IN THE UPPER DARBY SCHOOL DISTRICT	: : :	SPECIAL EDUCATION OPINION NO. 1769

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

BACKGROUND

The 14-year old student, who is the subject of this appeal, resides in the District and attended the District schools until seventh grade. NT 10, 11, 228. During sixth grade, Student experienced several incidents in school, which caused anxiety about attending school. This culminated when the school yearbook included a picture of Student and another identified child with the heading the "Odd Squad." NT 46, 47.

Student's Parent removed Student from the District school and enrolled Student in the Private School for seventh grade. Private School is a school that educates students with learning disabilities. FF 5. Student's Parent requested a due process hearing following the placement in the Private School and the hearing officer found in favor of the Parent. NT 228, 815; D-1. The Parent and the District entered into a Settlement Agreement following the due process hearing during the 2004-2005 school year. The Settlement Agreement provided for Student to attend Private School for two years during which the District would pay Student tuition. The Settlement Agreement provided a process and a schedule to conduct an evaluation and develop an IEP to meet Student's educational needs for the 2006-2007 school year. NT 78, 241; D-1.

District began the process to conduct the evaluation with a Permission to Evaluate request dated November 29, 2005 but District did not mail the form until December 12,

2005. NT 242, 409, 820-821; D-31. Student's Parent mailed the parental input information to District after signing the permission form. NT 243. District completed an evaluation of Student and drafted a report by March 1, 2006. NT 266, 841, 842. District sent a copy of the draft Evaluation Report (ER) to Student's Parent. Student's Parent rejected the ER and filed a dissenting report. D-25. Parent requested an Independent Educational Evaluation (IEE) at District expense as stipulated in the Settlement Agreement. NT 267, 411; D-1, 25.

District agreed to fund the IEE and sent a letter to Student's Parent indicating the funding. NT 413, 414, 419; D-21. The independent evaluator sent the completed IEE to District and the parties met to review the ER and the IEE. NT 383, 427, 433.

District planned a meeting on May 11, 2006 to consider the ER along with the IEE the Parent provided. The date of the meeting changed, at the Parent's request, to May 12, 2006. The District ER identified Student as a child who was emotionally disturbed. NT 383, 423, 425; D-11. District agreed to include a specific learning disability in writing at this meeting. NT 433, 434, 834; D-11. The Parent disagreed with the ER, noting said disagreement on the ER. Subsequently, Parent sent a letter to District noting objections to the report and requesting a due process hearing. NT 649; D-11.

District attempted to schedule a meeting to develop an Individualized Educational Program (IEP). District changed the first date at the Parent's request. District developed an IEP at the meeting. The IEP included one goal, "Currently [Student] is maintaining an "A" average in all of [Student's] academic classes. [Student] will meet the course objectives and maintain a passing grade in all classes." NT 469, 470, 472, 472, 863, 866; D-4, 19, 20, 21, 25. District offered a Notice of Recommended Educational Placement

(NOREP) near the end of the meeting. Parent signed the NOREP rejecting the IEP and requesting a due process hearing. NT 454, 455; D-3.

The Hearing Officer reviewed the evidence and testimony at the hearing and ruled in favor of the District. He ordered no corrective action.

ISSUES PRESENTED

Parent filed Exceptions via a 48-page brief mailed August 21, 2006 requesting that the Panel reverse the Hearing Officer's decision in all respects and order District to reimburse Parent for Student's continued attendance at the Private School.

The District answered these Exceptions with a 28-page brief faxed to the Office for Dispute Resolution on September 5, 2006. The District argued that the Panel should affirm the Hearing Officer's decision.

In the Exceptions, the Parent raised thirteen issues with sub-issues for several. The Parent alleges that the Hearing Officer erred in:

1. "... failing to apply the applicable standards under 34 C.F.R. § 300.7(b)(4) ..., which demonstrates that student was incorrectly identified as emotionally disturbed;

2. "...determining that the Reevaluation Report was appropriate, where the Report failed to adequately address student' s difficulty in producing written work with any degree of speed, with the result that there was insufficient information for writing a measurable annual goal for written expression in the IEP, or for providing modifications or specially designed instruction to address student's writing difficulties ...";

3. "...he described '[t]he heart of the argument over the results of the RR centers on the method used by the school district's psychologist ...the Response to Intervention Method,...";

4. "...failing to address the numerous procedural defects which resulted in a denial of FAPE, including:

   a. The Hearing Officer erred in finding that the RR and IEP Team were properly constituted, where neither team included a regular education teacher of the child, as required for the RR by 34 C.F.R. §§ 300.536, 532-535, 533,344 and IDEA 2004, § 1414 (c) and (d)(i)(B).

   b. The Hearing Officer erred in failing to address the fact that the IEP was defective where IEP Team Members did not attend the entirety of the IEP meeting, in violation of IDEA 2004, § 1414(d)(1)(C).

   c. The Hearing Officer erred in failing to address the fact that the IEP process was defective where key members of the IEP team were never provided with a copy of the RR at any time either before or during the IEP process.

   d. The Hearing Officer erred in failing to find that the Parent was denied meaningful involvement in the RR and IEP process, where everything of substance was pre-typed and predetermined without parental input ...";

5. "...finding that the single annual goal was either measurable or designed to confer the requisite educational benefit ...";

6. "...finding that student's Learning Disability in the area of written expression did not require a measurable annual goal in the IEP...";

7. "...finding that the District could pick and choose from the RR, including, rejecting or disregarding sections of the RR, in designing the IEP...";

8. "...failing to find the IEP defective due to the absence of measurable annual goals relating to emotional needs ...";

9. "...finding that the Program Modifications and Specially Designed Instruction (SDI) were adequate, where:

   a. the Modifications/SDI failed to address student's deficit in the timely production of written work.

b. the vague term "as needed" for the frequency of the modifications/SDI was inadequate and inappropriate and was not designed to confer meaningful educational benefit.

c. the District cannot provide the Modifications/SDI in the time allotted ...";

10. "...failing to address the inadequacy of the IEP in failing to offer a plan for transition of student from the Private School to the very different environment of the [District's] High School, particularly where the Hearing Officer specifically found that '[t]he student has shown anxiety over the prospect of leaving [Private] School and returning to [Student's] home school.'" FF. 74...;

11. "...failing to find that the District violated its Settlement Agreement when it refused Parent's request to continue the single IEP meeting for additional time, not to exceed 30 days...";

12. "...failing to strike the District's answers to the Parent's due process requests, or otherwise provide a remedy, where the District failed to convene a Resolution Session within the mandatory fifteen (15) day period after receiving Parent's due process requests...";

13. "...failing to direct prospective tuition reimbursement, where the District failed to demonstrate that it would provide FAPE, where Private School is an appropriate placement for student and where the equities clearly favor tuition reimbursement ...."

Parent Exceptions @ 1-4.

For clarity and brevity, the Panel will consider the Exceptions as follows:

1. Whether the Hearing officer erred in finding that Student was emotionally disturbed? (Parent Exception 1)

2. Whether the Hearing Officer erred in determining that the ER was appropriate? (Parent Exceptions 2 & 3)

3. Whether the Hearing Officer erred in finding that the IEP offered by the District was appropriate? (Parent Exceptions 4, 5, 6, 7, 8, 9 & 12)

4. Whether the Hearing office erred in finding that the IEP did not require a transition plan for Student's return to District's High School? (Parent Exception 10)

5. Whether the Hearing Officer erred in finding that the District followed the Settlement Agreement? (Parent Exception 11)

6. Whether the Hearing Officer erred in not awarding Student prospective tuition reimbursement to Private School? (Parent Exception 13)

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.*

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. However, Pennsylvania's Commonwealth Court has held that the Appeals Panel is a fact-finding body and must make an independent review of the record in any case before it. *See B.C. v. Penn Manor School District,* 2006 Pa. Commw. LEXIS 445 *6 (Pa. Cmwlth. 2006). Further, the Appeals Panel is the final finder of fact.

Based upon that standard, we affirm in part and reverse in part the Order of the Hearing Officer.

District Correctly Identified Student As A Child With An Emotional Disturbance

In the Exceptions, the Parent alleges that District improperly identified Student as an emotionally disturbed student contending that District should have identified Student as a child with a specific learning disability. *See* Parent Exception 1. The Parent claims that the District failed to follow the provisions of 34 C.F.R. § 300.7(b)(4) in that Student did not exhibit the enumerated characteristics over a long period and to a marked degree that adversely affects a child's educational performance. We disagree.

The record is replete with references to the emotional problems with which Student deals. *See e.g.* NT 42, 68, 101, 102, 148 (takes medication for emotional problems), 170 (takes medication for ADHD), 317 (benefits from the emotional support group at Private School), 319 (acts out when in anxious situations), 341 (has trouble coping with anxiety), 461 (needs emotional support to decrease anxiety), and 803 (in

distress and emotionally distraught and needed services). Thus, student does exhibit characteristics associated with emotional disturbance to a marked degree and over a long period of time. Furthermore, the record supports a finding that the characteristics (especially anxiety) adversely affect Student's performance. Therefore, we affirm the Hearing Officer on this point.

In addition to identification as a student with emotional disturbance, Student has an undisputed diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). A student diagnosed with ADHD is entitled to identification as a student with Other Health Impairments (OHI) when such condition interferes with learning. 34 C.F.R. § 300.7(c)(9)(i). The District failed to identify Student as a child with OHI, despite many references to the ADHD in the record. *See e.g.* NT 113, 171, 342, 369, & 561.

More important, District and Student's Parent miss the fundamental fact that a student's needs determine the services to which a child is entitled and the services do not flow from the identified disability, but rather from the needs resulting from the disability. *See* 34 C.F.R. § 300.347. Thus, the issue of categorical identification is at best academic. Quite simply, categorical identification establishes eligibility for special education and services. It does not determine the nature, location, or extent of such services. Parent's Exception number one is dismissed. However, Student shall also be identified as a student with other health impairment.

The Evaluation Report Is Not Appropriate

District is required to conduct an evaluation to determine if a child is eligible for services. The evaluation must be complete and individual. The evaluation must review

existing data and determine if additional data are needed. 34 C.F.R. § 300.531(a) & (c). The information must come from a variety of sources and be carefully documented. 34 C.F.R. § 300.535(a)(1) and (2). The District must consider an IEE if one is available. 34 C.F.R. § 300.535(c)(1). The District may use a process to determine eligibility for a specific learning disability in which it determines if the child responds to a scientific research-based intervention. 20 U.S.C. § 1414(b)(6)(B). Such evaluation must address the area of suspected disability. *See,* for example, Kovaleski and Prasse (2004). Response to instruction in the identification of learning disabilities. *NASP Communique*, 32.

The District argues that its ER is appropriate in that it had all the required components mentioned above, and that it used an alternative process based on a response to intervention model. 20 U.S.C. § 1414(b)(6)(B), NT 400-446, Leren Deposition @18. We disagree.

The Response to Intervention Model is a process in which a district identifies an at-risk student and monitors progress to determine if the student shows adequate growth after receiving high quality evidence based instruction in the area. If the student does not respond to high quality, research validated instruction in the general education setting, then the district provides additional interventions while monitoring the student frequently. The district collects data and uses that data to make subsequent decisions about more intensive instruction. *See* www.iris.peabody.vanderbilt.edu-Perspectives and Resources.

The record is devoid of any such process that the psychologist used to determine if Student had a learning disability. The record shows that the psychologist did a records

review, administered some standardized testing, and reviewed the PSSA materials concluding that Student had no learning disability. *See* Leren Deposition at 11, 95, 157, 180. This process falls short of the requirements for a response to intervention determination. Most importantly, the District conducted no intervention, collected no data, and did not examine Student's response to intervention in the area previously identified as a learning disability (written expression). Thus, District can determine neither whether Student continues to meet the criteria for identification as a student with a **specific** learning disability (SLD), nor can it determine if any interventions are effective. Quite simply, what the District did was to examine general achievement measures and conclude that Student did not have a specific learning disability because general measures are in the average range. This conclusion is paradoxical because the District also concludes Student's emotional problems interfere with Student's learning and performance in written expression. Thus, for the diagnosis of ED, the District examined specific performance that is well documented in the Student's history, but for the SLD they examined only general measures. (*See,* again, Kovaleski and Prasse, *supra,* (very brief discussion of specific curriculum-based measures that should have been used). Parent's Exceptions number two and three are granted. The District's evaluation report is fatally flawed in that it did not follow the prescribed protocol for an RTI process; it was not comprehensive in that it did not address the area of documented and suspected continuing need and the conclusions are inconsistent across the areas of suspected disability (SLD or ED).

District's IEP Is Not Appropriate

An IEP is deemed appropriate if it meets the procedural requirements of the IDEA and the district designed it to confer meaningful educational benefit. *See In Re the Educational Assignment of J. K.,* Spec. Educ. Op. No. 1481 (2004) citing *Board of Education v. Rowley,* 458 U.S. 176 (1982); *Polk v Central Susquehanna Intermediate Unit 16,* 853 F 2d 171 (3rd Cir. 1998); *Fuhrmann v. East Hanover Board of Education,* 993 F. 2d 1031 (3rd Cir., 1993); *Susan N. v. Wilson School District,* 70 F. 3d 751 (3rd Cir. 1995); *Neshaminy School District v. Karla B.*, 25 IDELR 725 (ED PA, 1997); *Oberti v. Board of Education of the Borough of Clementon,* 995 F.2d 1204 (3rd Cir. 1993); 20 U.S.C. § 1412 (a) (5); and 34 C.F.R. §§ 300.300 and 300.550. The IEP must provide more than a trivial or *de minimus* benefit. The district must design the IEP so that the benefit relates to the child's potential. *Polk supra*; *Fuhrmann, supra*; *Hall, ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985); *Kelsey B. v. Camp Hill School District*, Civil Action No. 1:CV-01-1082 (MD Pa. 2003). A school district must show that a proposed IEP will provide a child with meaningful educational benefit measured at the time the district offers the IEP. *See In Re the Educational Assignment of J. F.,* Spec. Educ. Op. No. 1238 (2002); *T.R. v. Kingwood Township Board of Education,* 205 F.3d 572 (3rd Cir. 2000); and *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

In the present case, having found that the ER upon which the District based the IEP is not appropriate, we need go no further. The IEP cannot reflect the Student's needs because the ER does not identify Student's needs. However, other aspects of the IEP deserve comment. District produced an ER that identified Student as a child with a

specific learning disability and with emotional disturbance. It noted that the written expression deficit involved processing speed. NT 217, 218. The ER also expressed a need for social and emotional support. *See* Leren Deposition 72, 73. However, there is no goal to address Student's emotional needs and there is no goal to address Student's writing difficulties. There is no way to measure Student's progress since the Student's IEP has no need-specific goals. Moreover, the goal that is included in the IEP, is so vaguely written, that it permits Student to earn grades of "C" and "D" and still "master" that goal. Student has already demonstrated more potential than that, and is legally entitled to a more individualized and measurable IEP goal. These omissions are fatal flaws in the IEP rendering it inappropriate.

Student's Parent also raises procedural violations in several instances in the Exceptions. There is no question that District committed the procedural violations. If we needed to review the procedural violations, we would then have determined if the violations denied Student a Free Appropriate Public Education (FAPE). However, since the ER and IEP are inappropriate, we do not need to determine the impact of the procedural violations. District's IEP is substantively deficient because it does not address the Student's needs. Parent Exception numbers four through nine and twelve are granted.

The IEP Failed to Include a Plan for Student's Transition into District's Schools

The intent of the Settlement Agreement developed by District and Student's Parent was to provide a means to transition Student to the District schools after a period of two years. *See* D-1. The IEP developed at the meeting on May 23, 2006 included no plan for such transition. District could have, and should have, provided some assistance

for Student to transition to District's High School after hearing of Student's increased anxiety in anticipation of the change. NT 52-54, 60, 104, 148, 174; D-3, 11. Parent's Exception number ten is granted. The IEP is deficient and inappropriate because it does not include the necessary plan for transition. Such deficiency is likely to exacerbate Student's anxiety, making the return even more difficult.

District Followed the Settlement Agreement

The Settlement Agreement developed by District and Student's Parent included a specific timeline for the development of an IEP for the 2006-2007 school year. *See* D-1. The District argues that the IEP team had developed an IEP as specified in the Settlement Agreement and no further time was either necessary to meet conditions of the Settlement Agreement. The Parent argues that an additional 30 days was necessary to consider the ER and the IEP. However, the Parent only asked for the extension the day before the meeting. NT 670, 671, 687, 721, 739, 740, 829, 861; D-1.

Further, the Parent did not sign the NOREP following the development of the IEP and exercised rights under the terms of the Settlement Agreement and applicable law. District and Parent's actions resulted in no damages to anyone in the process. There was no damage done to Student. Parents utilized the due process procedures to which they were entitled and any harm resulting from District's refusal to extend the time has been mitigated by this process. Parent's Exception number eleven is dismissed.

Parent Is Entitled to Tuition Reimbursement for the Private School Placement

The Parent placed Student in Private School for the 2004-2005 school year and, following a due process hearing and the development of the Settlement Agreement, received tuition reimbursement for the 2004-2005 and 2005-2006 school years. Parent now seeks reimbursement for the current 2006-2007 school year.

When a parent unilaterally removes the child from the district and places that child in a private school, we must examine three issues to determine if the Parent is entitled to tuition reimbursement. First, we must determine if the district offered an appropriate IEP. Second, if the IEP was not appropriate, we must determine if the parental placement was appropriate. If the parent's placement was appropriate, we must weigh the equities in the case. 34 C.F.R. § 300.403(c) & (d).

In the present case, the IEP is inappropriate. *See* DISCUSSION, *supra*. Second, we find the Private School's placement to be appropriate. The Private School provides services to students who have learning disabilities, has small classes, uses a personalized education plan for each student akin to an IEP, provides group programming and emotional support provides a mentoring program and a clinical program. NT 283, 314, 315. During the 2004-2005 and 2005-2006 school years, Student made progress at Private School. NT 56, 63-64, 91, 154, 320, Leren Deposition @ 137. Interestingly, even the District's expert testified that the Private School is not an inappropriate program for Student. Leren Deposition 140. The Private School provided an appropriate program and is an appropriate placement for Student.

Finally, the equities in this matter favor the Student. Student's Parent did not delay the process. Parent met the timelines early, attended all of the meetings,

participated in all of the discussions, and communicated disagreements in written form to District. *See* NT 242, 243, 884, D-4, 11. The District failed to meet its responsibility to produce an appropriate ER and IEP. No actions of the Parent contributed to this District error. Student is now being served appropriately at Private School for the current school year (2006-2007). Given Student's success at Private School, Student's anxiety and other individual needs, it would be too disruptive and damaging to transfer the Student to the District school at this point in time, even after the District revises its ER and IEP to comport with this Decision. The equities favor the Parent. Parent's Exception number eleven is granted. Parents are entitled to tuition reimbursement for the current school year (2006-2007).

Accordingly, we enter the following:

ORDER

The decision of the Hearing Officer is affirmed in part and reversed in part. It is hereby ordered that:

1. the District shall conduct an evaluation consistent with this Decision.

2. the District shall develop an IEP based upon the ER developed. The IEP shall address all of Student's needs, especially those in the area of written expression and anxiety and other behavioral emotional issues, and shall include a specific plan to assist Student's transition to District's High School.[1]

[1] The transition plan should include, at a minimum, several sessions with a high school counselor to plan a program of studies for Student well in advance of the transition to the high school; afford regularly scheduled meetings with the guidance counselor; careful assignment of the student to courses taught by teachers with an understanding of Student's problems; and careful monitoring of Student's peer-to-peer interactions.

3. the District shall determine a placement consistent with the IEP developed. The placement shall occur at a time when a natural break occurs in the school programming of District's High School and Private School.[2]

4. the District shall reimburse Student's Parent for any costs associated with the tuition for Private School upon presentation of a suitable invoice for the services. If the Parent has not paid the entire tuition for the year, the District shall pay the tuition costs directly to Private School.

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

Barry O. Smith
Barry O. Smith, Ed.D.
For the Appeals Review Panel

Signature Date: September 21, 2006
Mailing Date: September 21, 2006

[2] The appropriate natural break for Student to transition from Private School to the District's High School is the start of the 2007-2008 school year.