

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: NM
ODR #8884/07-08 KE

Date of Birth:
Xx/xx/xx

Date of Hearing:
September 9, 2008

CLOSED HEARING

Parties to the Hearing:

Mr.
Ms.

Tamaqua Area School District
PO Box 112
Tamaqua, Pennsylvania 18252

Representative:

Pro Se

Angela Januski Evans, Esquire
Marshall, Dennehey, Warner et al
401 Adams Avenue, Suite 400
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Date Transcript Received:

September 14, 2008

Date of Decision:

September 25, 2008

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is a middle teen age eligible student who was formerly a resident of the Tamaqua Area School District (hereinafter District). Student is classified under the category of emotional disturbance. Student was enrolled in a cyber-charter school; following an inpatient psychiatric hospitalization the treatment team at the hospital recommended a partial hospitalization program. Rather than return Student to the cyber-charter school, Parents enrolled Student in the District on or about April 9, 2008. The District immediately began providing the student with alternative education after school hours in one of the District's school buildings, in the amount of five hours per week, with the understanding that the District would seek a school-based partial hospitalization placement for Student. Despite several applications, Student was not accepted into any of the school-based partial hospitalization programs to which the District applied, so Student continued receiving alternative education in a school building until on or about May 27th at which time the Parents moved to another school district. In total Student was enrolled in the District for a period of about seven weeks. The Parents filed for this hearing because they believe that the District's inability to promptly locate and effect admission for Student to a school-based partial hospitalization program constituted a denial of a free appropriate public education (FAPE). They are seeking compensatory education services.

District Exhibits admitted to the record were: S-4, S-6, S-7, S-8, S-9, S-14, S-15, S-16, S-19 and S-20. An objection to P-1 was sustained and that exhibit is not part of the record and was not used in writing this decision, although it is included in the packet of exhibits should a reviewing body find that the exclusion was improper.

Issue

1. Did the Tamaqua Area School District fail to provide Student a free appropriate public education during the seven week period Student was enrolled in the District?
2. If the District did not offer Student FAPE during this time period, is Student entitled to compensatory education and in what form and amount?

Findings of Fact

Attempted Placements

1. Student is an eligible student under the classification of emotional disturbance. Student has been diagnosed with Bipolar I Disorder, Oppositional Defiant Disorder and Intermittent Explosive Disorder, with a rule-out¹ of Schizoaffective Disorder. (NT 34)

¹ Rule/out means that the diagnosis is under consideration at the time as a possible diagnosis.

2. A psychiatric reevaluation from February 2008 notes that Student had been psychiatrically hospitalized approximately 13 times as of the date of that evaluation. In June 2007 Student was placed at the [redacted] Residential Treatment Facility. (S-20)
3. Among other inappropriate behaviors, Student had been physically aggressive towards mother and siblings, had inappropriately touched private areas of mother and her boyfriend, had threatened to kill everyone in the house, had tried to choke self, had put mother's car in park while she was driving, and had made a threatening gesture toward an RTF staff member. (NT 33-35, 39; S-20)
4. In March 2008 Student was psychiatrically hospitalized at [psychiatric hospital] because of suicidal and homicidal threats. (NT 26, 30-32)
5. Following this psychiatric hospitalization Student was discharged to home rather than back to the RTF. Upon discharge the recommendation made by the hospital staff was for Student to be enrolled in a partial hospitalization program²³. (NT 27)
6. After conferring with the District's special education director on April 4, 2008 and based upon their previous good experience with the District in regard to their other children, the Parents⁴ decided to enroll Student in the District rather than returning Student to the cyber charter school. They disenrolled Student from the cyber charter school. (NT 26-27, 49-51, 70, 77, 88)
7. Student was registered in the District on April 7th, was discharged from the psychiatric hospital on April 9th and Student's instruction became the District's responsibility as of April 10th. (NT 53, 89)
8. At the time the Parents registered Student they gave the District a copy of the psychiatric hospital discharge summary. (NT 90)
9. The District immediately arranged a visit for April 10th to [redacted] partial hospitalization program, a "sister program" to the program one of Student's siblings attended. The visit did not go well and Student was not accepted. (NT 70, 72-73, 90)
10. The District convened an IEP meeting on April 14, 2008. (NT 89, 92; S-16)

² The record is not clear as to why admission to a partial hospitalization program was not secured as part of the process of discharge from inpatient psychiatric hospitalization.

³ The Parents at that time indicated they wanted Student enrolled in a boot camp. (NT 102)

⁴ Although "Parents" is used throughout this decision it is understood that either the mother or the father acted in any specific case.

11. The Parents and the District⁵ hoped that a referral to a partial hospitalization program would be effected in a relatively short period of time, in a “timely manner”. The IEP was written to be implemented from April 15, 2008 through May 18, 2008. (NT 28, 54-55; S-16)
12. On April 15th the District contacted the [redacted] program in [town redacted], a program run by Student’s treating psychiatrist. Although this program was willing to accept Student, there were no openings. (NT 80, 82, 96)
13. The District then arranged a meeting at [redacted] on April 21st. Although the Parents thought the meeting went well, Student was not accepted as the psychiatrist was concerned about Student’s violent behaviors. (NT 70, 73, 95-96)
14. The District contacted the area’s mental health liaison and the CASSP coordinator for assistance in the placement process. (NT 98)
15. A CASSP meeting was arranged for April 23rd but the Parents canceled the meeting. (NT 99)
16. In May the District arranged a CASSP meeting for June 4th. (NT 100)
17. The District contacted [redacted agency] towards the end of May to try to secure help in finding a placement for Student. (NT 96)
18. The District has no control over whether or not a student will be accepted into a partial hospitalization program. (NT 91)
19. Because the original IEP was written to expire on May 18, 2008 on May 16, 2008 the District convened another IEP meeting since a placement for Student in a partial hospitalization program had not yet been secured. The Parents continued to approve the District’s proposed program. (NT 59-60, 79; S-14)
20. On May 27, 2008 the Parents informed the District by telephone that they were moving out of the District. (S-6)
21. The Parents obtained housing out of the District on May 27th and moved from the District on May 31st. (NT 109-110)
22. At some point after leaving the District Student was accepted into the [redacted] program, another program run by Student’s psychiatrist. The psychiatrist did not make the Parents or the District aware of that program at the time they were told the [other program supervised by this psychiatrist] was full. (NT 82-83)

⁵ Although “District” is used throughout this decision, the director of special education was the staff person involved.

23. Student was hospitalized in June 2008 for violent behavior and again at the end of August 2008 for a suicide gesture/attempt. (NT 75-76)

Program Offered by District

24. While Student was placed at Residential Treatment Facility Student was receiving schooling through a cyber charter school, according to the Parents for 30 hours per week. (NT 52)
25. The NOREP dated April 14, 2008 proposed “alternative education in the home setting⁶ during afternoon hours with full time emotional support services”. The Parents approved the recommendation. (NT 79; S-15)
26. The District wanted to ensure that Student was provided a highly qualified (regular education) teacher to deliver the content area and an emotional support special education certified teacher to keep track of progress monitoring and monitor behavior. Student was to receive two-to-one instruction five hours per week. (NT 92-93, 138)
27. Prior to beginning the instruction the two teachers and the director of special education met with the Parents and with Student. (NT 114)
28. Initially the instruction was planned for two blocks of 2.5 hours per session weekly, but because Student’s attention span rarely exceeded 15 seconds the teachers adjusted the schedule to more frequent blocks of less time; Student was still supposed to receive 5 hours per week. (NT 93-94, 121-122, 140-141, 147)
29. Because Student was resistant and displayed inappropriate behaviors the teachers quickly altered the way they worked with Student, combining project-oriented activities and computer-based activities with paper and pencil activities. (NT 117-118, 122, 124-125, 142-143)
30. The teachers addressed a variety of academic subjects with Student. These included: math, science, vocabulary, geography, reading, grammar, spelling, history. (S-8, S-9)
31. The teachers also addressed social/emotional needs with Student. These included: teaching coping skills and techniques, improving attention span and focus, redirecting Student’s anger, setting firm limits and improving social skills. (NT 116, 126-127, 130-131, 139; S-8, S-9)
32. Instruction was provided to Student as follows: Week of April 14 – 5 hours; Week of April 21 – 2.5 hours (second session of 2.5 hours canceled by Parents because

⁶ For reasons not made clear in the record the instruction was delivered in the middle or high school building after hours rather than in the home. (NT 114, 144)

of a doctor's appointment); Week of April 28 – 4 hours; Week of May 5 – 5 hours; Week of May 12 – 3 hours (another session was scheduled but Student refused to stay and went home); Week of May 19 – 5 hours; Week of May 27 – 2.5 hours. Over the seven-week period Student was in the District Student should have received 35 hours of instruction but received only 27 hours. The parents canceled one 2.5 hour session and Student refused to stay for a 2-hour session, therefore the District failed to offer/provide Student with 3.5 hours of educational instruction. (S-7)

33. The Parents do not believe that Student could have been educated in a school building with other children at the time Student was enrolled in the District. They believe that Student needed a partial hospitalization program as recommended upon Student's discharge from inpatient psychiatric hospitalization. (NT 63-64)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.⁷ Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing Officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

The Parents appeared pro se and testified on behalf of their child. The father was not present in the family for some of the time period about which he was testifying and therefore did not have a clear recollection about events during this period. The mother disclosed that her memory has been impaired as a result of several recent strokes. Nevertheless the Parents were able to provide a coherent general picture of events. They clearly are very concerned about their child and frustrated by the difficulties they encountered in obtaining the mental health treatment that psychiatric personnel recommended upon discharge from a psychiatric hospitalization. They also believe that their child required more than five hours per week of instruction while waiting for placement in a partial psychiatric hospital.

The witnesses testifying for the District were clear in their recollection of events and were able to produce contemporaneous documentary evidence of their activities. The District's witnesses were highly credible.

⁷ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Legal Basis, Discussion and Conclusions

Burden of Proof – The Parents requested this hearing and therefore they bore the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio.

In this matter the evidence was not in equipoise.

Did the Tamaqua Area School District fail to provide Student a free appropriate public education during the seven week period Student was enrolled in the District?

Children with disabilities who require specially designed instruction are guaranteed a free, appropriate public education (FAPE) by federal and commonwealth statutes.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Eligible students are entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (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 (E.D. PA. 1996)). The program must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v.

Diamond, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

“Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate, to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

The District acted very responsibly in its repeated efforts to find a partial hospitalization program that would accept Student, and in its provision of FAPE on a temporary basis. Although it is still unclear to this hearing officer why recommended discharge planning was not carried out by the psychiatric inpatient hospital, the District accepted responsibility and set up an interview for a partial hospitalization program the very first day after Student was discharged from the inpatient psychiatric unit. [FF 9] Soon thereafter the District set up other appointments and/or made applications on Student’s behalf. [FF 12, 13, 14, 15, 16, 17] The District had no power or authority to force a partial hospitalization program to accept Student, or to force a program which would have accepted Student but for an opening to make a space for Student. [FF 18] The Parents made much of the fact that once enrolled in another District a partial hospitalization placement was secured for Student, but the circumstances surrounding this were not placed into evidence. There are any number of reasons why a placement was eventually secured, such as for example further assistance from the mental health system or spots becoming available as the school year drew to a close. The fact that on the watch of the second district a psychiatric placement was found for Student does not mean that the first District was negligent.

In addition to trying to effectuate a placement in a partial psychiatric hospital program, the District also designed an appropriate temporary alternative educational program for the student with absolutely no lead time. Student enrolled in the District on April 7th, was discharged from the hospital on April 9th and on April 14th (after having visited a potential partial psychiatric placement on April 10th) the District held an IEP meeting [FF 10] with a second meeting a month later. [FF 19] Instruction addressing Student’s needs as the District could discern them at the time was designed, and the District arranged that Student’s instruction would be carried out by two teachers, one a highly qualified regular education teacher and one a special education emotional support teacher. [FF 26, 27, 28, 29, 30, 31] Given Student’s recent behavioral history, the fact that Student was recommended for another psychiatric setting, and the thought-to-be temporary nature of

the alternative educational program, educating Student after school hours with no other students present was an appropriate plan. The team of teachers addressed Student's academic and behavioral needs, managing to provide substantive instruction without precipitating serious behavioral outbursts or triggering another inpatient hospitalization.

If the District did not offer Student FAPE during this time period, is Student entitled to compensatory education and in what form and amount?

The only fault that this hearing officer finds with the District is the failure to offer Student the full 35 hours of instruction pursuant to Student's NOREP. The District provided 27 hours, and was prevented by the Parents or Student from providing another 4.5 hours. [FF 32] Therefore Student was deprived of 3.5 hours which the District will be ordered to make up via compensatory education.

Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. M.C. v Central Regional School District, 81 F.3d 389 (3rd Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 488 U.S. 923 (1991). The District will be ordered to provide Student with 3.5 hours of compensatory education. The Parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the goals of Student's present or future IEPs. Such hours must be in addition to Student's then current IEP and may not be used to supplant such services. These services may occur after school hours, on weekends and during the summer months, when convenient for Student and the Parents.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of Student's present or future IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services.

Order

It is hereby ordered that:

1. The Tamaqua Area School District offered Student a free appropriate public education in all respects pertinent to this matter, except for failing to provide three-and-a-half (3.5) hours of instruction in accord with Student's NOREP.
2. The Tamaqua Area School District must provide Student with three –and-a-half (3.5) hours of compensatory education as described above.

September 25, 2008

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

Hearing Officer