

**THE SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL
COMMONWEALTH OF PENNSYLVANIA**

**IN RE THE EDUCATIONAL :
ASSIGNMENT OF : SPECIAL EDUCATION
J.K., A STUDENT IN THE : OPINION
MANHEIM TOWNSHIP :
SCHOOL DISTRICT : NO. 1825**

BEFORE APPEALS PANEL OFFICERS SEVEN, MCELLIGOTT & KAUFMAN
OPINION BY SEVEN, APPELLATE OFFICER

BACKGROUND

Student resides with parents [hereinafter referred to as “Parents”] in the Manheim Township School District [hereinafter referred to as “the District”].

Student has attended school in the District since kindergarten, when Student entered a Spanish immersion program.¹

In the 1998-99 school year (3rd grade) Student struggled with handwriting issues and learning to read in English.² Student was also diagnosed with Obsessive Compulsive Disorder by a child psychiatrist.³

In the 1999-2000 school year (4th grade) Student was diagnosed with Tourette Syndrome.⁴ Parents chose not to inform District of this diagnosis at that point.⁵

Student progressed through regular education classes but struggled academically at various points, including with handwriting, organization and completing homework. In the 2004-05 school year (9th grade), Student began spending more and more time completing schoolwork and studying and received better grades on homework and class work than tests or quizzes.

¹ NT at 31.

² P-4 at 10.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

By the 2005-06 school year, Student was spending a significant amount of time on schoolwork and studying. In May 2006, at the end of Student's 10th grade year, Parents contacted the District about implementing a 504 plan, seeking extended time for test taking and the SATs.⁶ The District reviewed Student's grades, class performance and medical information, but did not complete an evaluation. At a meeting on June 8, 2006, the team denied eligibility under § 504.⁷

On or before June 13, 2006, Parents sent a letter to the District, requesting an evaluation to determine whether Student qualifies as Other Health Impaired under the IDEA.

The Director of Pupil Services for the District responded via e-mail dated June 17, 2006 that the evaluation would begin after the start of the school year and via letter which enclosed a copy of IDEA, regulation 300.7 and requested that Parents "mark[], with a highlighter, area(s) of disability that you suspect that Josh "has".⁸

On June 28, 2006, Parents met with the Director of Pupil Services to discuss § 504. On July 26, 2007, District mailed Parent a letter stating that she inferred that Parents were no longer requesting an evaluation and again asking Parents to highlight the regulations as to which areas of disability they suspect Student of having.⁹ The letter indicated that if Parents do not respond, District will conclude that they are no longer requesting an evaluation.¹⁰ Parents did not respond to the letter.

In Fall 2006, Parents sought an Independent Education Evaluation [hereinafter referred to as "IEE"] from a licensed psychologist , who conducted a battery of tests and

⁶ SD-1

⁷ SD-4.1

⁸ SD-5

⁹ *Id.*

¹⁰ *Id.*

reviewed medical history, educational history and parental input.¹¹ These tests included the Weschler Intelligence Scale for Children -IV (“WISC-IV”) which indicates an overall level of intellectual functioning in the Average range of ability with a full scale IQ of 95, which converts to a percentile rank of 37 when performance compared to other individuals of the same chronological age in the general population.¹²

On the WISC-IV, Student exhibited strengths in verbal reasoning (63%), vocabulary knowledge (75%), listening comprehension (75%), long-term memory for facts and details (63%), the ability to form verbal generalizations (75%), short term auditory working memory (75%) the ability to form sound symbol relationships (63%) and math facts recall (63%).¹³

Student performed less well on tests measuring visual analysis and synthesis of abstract geometric forms (37%), non verbal reasoning (37%) and visual perception of details from concrete, pictorial presentations (37%) and demonstrated significant weaknesses in non-verbal concept formation (2%), visual scanning/tracking speed (16%) and clerical speed/accuracy (16%).¹⁴

The IEE also contained results of the Woodcock-Johnson/III, which was administered to assess academic fluency in reading, math and writing. Student tested in the 16th % for academic fluency, which was discrepant to overall cognitive abilities.

The IEE recommended Student as qualifying under the IDEA based upon Other Health Impaired and Specific Learning Disability in the areas of written expression and reading fluency. In addition to specially designed instruction to improve writing skills,

¹¹ P-4, p. 22, N.T. 90.

¹² P-4

¹³ *Id.*

¹⁴ *Id.*

the IEE recommended that Student receive an assistive technology evaluation as well as accommodations related to test taking and homework completion.¹⁵

On or about October 20, 2006, District received a copy of the IEE. On or about October 31, 2006, District issued a Permission to Evaluate.¹⁶

As an eleventh grader, Student's course load includes advanced placement, "AP", Spanish, accelerated theoretical algebra/trigonometry, honors chemistry, AP psychology, creative writing and college level English 101.¹⁷

On November 10, 2006, the District informed Parents that Student could receive extra test taking time in most classes upon request.¹⁸ On January 5, 2007, the District issued its initial evaluation report [hereinafter referred to as "District ER"].¹⁹

As part of its evaluation, the District reviewed the results of the IEE, input from the parent and an advocate, a summary of assessment results from the first through eleventh grade and classroom performance.²⁰ Also, an occupational therapist reviewed two handwriting samples of Student and found adequate legibility and age appropriate abilities.²¹

Student informed the school psychologist of difficulties in timely completing tests; increased stress and tic aggravation while preparing for tests and compulsive tendencies while filling out scantron answer sheets.²² Student requested a quiet place for test taking; extended time to complete tests and a copy of teacher's notes.²³

¹⁵ NT at 97.

¹⁶ SD-5; P-7 at 35.

¹⁷ SD-28.

¹⁸ P-7 at 41.

¹⁹ SD-13.2.

²⁰ SD-13.2.

²¹ *Id.*

²² *Id.*

²³ *Id.*

After the evaluation, the District concluded that Student did not meet the criteria for a specific learning disability or as other health impaired.²⁴

On January 6, 2007, Parent contacted the District and requested that during high stakes testing, lasting more than two hours, that Student receive extended time and breaks if needed.²⁵

On January 12, 2007, Student received notification from the College Board approving extended testing time for the PSAT, SAT and AP examinations.²⁶

The District provided Student with extra time for January 2007 mid-term examinations.²⁷ On February 21, 2007, the District issued a 504 evaluation report based on information compiled from its IDEA evaluation, the IEE, a letter from Student's psychiatrist and data from a meeting held with the parents. The 504 report issued by the District concluded that Student did not have a physical or mental impairment that substantially limited a major life activity.²⁸

On March 8, 2007, the District, through a memo entitled "Discretionary Provisions" permitted Student to use test paper instead of a "scantron" scoring sheet, authorized extra test taking time and reduced homework upon request.²⁹

On March 30, 2007, the District issued a clarifying memo to Student's teachers advising that the prior communication concerning "discretionary" provisions for extended time during tests and other accommodations was in fact mandatory.³⁰

²⁴ *Id.*

²⁵ P-7 at 70.

²⁶ SD-15.

²⁷ SD-16 at 5.

²⁸ *Id.*

²⁹ SD-17-18.

³⁰ SD-31.

In the advanced placement Spanish class, Student's instructor, on occasion, has noted a decline in Student's physical appearance throughout the school year, less energy and more exhaustion and an occasional lack of focus.³¹ The instructor provided extended testing time for Student on the mid-term after receiving district approval and modified homework assignments.³²

In AP psychology class, Student's instructor noticed a decline in Student's appearance and a lack of energy.³³ The instructor further noted that Student's writing is simplistic, but that Student belongs in the AP class.³⁴

In theoretical Algebra/Trigonometry, Student has received extended time to complete testing as well as accommodations regarding homework completion.³⁵

Parents filed a due process complaint seeking various accommodations under §504 as well as classification as an eligible student under the IDEA. Due process hearings occurred on March 28, 2007 and April 11, 2007. During two days of hearings, Parents appeared *pro se* with Student examining witnesses and an attorney represented the District. The Hearing Officer found that Student does not qualify as a student with a disability under the IDEA and that Student does not qualify under § 504.

Parents filed timely exceptions.

ANALYSIS

Instantly, Parents challenge the Hearing Officer's determinations that the District satisfied its obligations to Student under § 504 and that Student does not qualify for

³¹ N.T. at 30-31, 54-55.

³² N.T. at 47.

³³ N.T. at 86.

³⁴ N.T. at 63-64.

³⁵ N.T. at 162-163, 173, 175, 177.

special education and related services under the IDEA. As a preliminary matter, this panel does not have jurisdiction to address the § 504 claims.³⁶ Therefore, that portion of the appeal is dismissed without prejudice.

The remaining issue is whether the Hearing Officer erred as a matter of law in finding that Student does not qualify as a child with a disability under the IDEA. In addressing this exception, it is well settled that this Panel must conduct an independent review of the record and determine whether any error of law has been committed.³⁷ The standard of review is *de novo* for legal conclusions and deference to the findings of the hearing officer as to credibility “unless 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.”³⁸

Under the IDEA and its implementing regulations, a child with a disability includes a child: “(i) with . . . other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education³⁹ and related⁴⁰ services.”

In first addressing whether Student meets the criteria for other health impairments,⁴¹ three factors must be addressed: 1) whether Student has “limited strength,

³⁶ See, e.g., Special Educ. Opinions Nos. 1744 (2006), 1736 (2006), 1638 (2005), and 1628 (2005).

³⁷ *B.C. v. Penn Manor Sch. Dist.*, 906 A.2d 642, 645 (Pa. Commw. Ct. 2006); *York Suburban Sch. Dist. v. S.P.*, 872 A.2d 1285, 1287 (Pa. Commw. Ct. 2005).

³⁸ *Id.*; Special Educ. Opinion No. 1768 (2006), at fns 30 & 31.

³⁹ The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including . . . instruction conducted in the classroom.” 34 CFR § 300.39. Specially designed instruction means “means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child that result from the child’s disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” *Id.* § 300.39(b)(3).

⁴⁰ *Id.*

⁴¹ 34 C.F.R. § 300.8(c)(9). *Other health impairment* means: “having limited strength, vitality, or

vitality or alertness” which is 2) due to chronic or acute health problems, including Tourette Syndrome that 3) adversely affects a child’s educational performance.

As the hearing officer found that the first two prongs are met and the record amply supports her conclusion,⁴² this Panel will focus on the third prong, whether the Tourette Syndrome adversely effects educational performance. At the outset it should be noted that neither the IDEA nor its implementing regulations specifically define “adversely effects” and support is made for a “case by case” determination.⁴³ Furthermore, although academic success and passing grades are a consideration, other factors,⁴⁴ including outside supports are also relevant.⁴⁵

Determining whether Student’s Tourette Syndrome effected Student’s educational performance in this case is particularly challenging for several reasons, including Student’s desire to succeed in academically rigorous program at all costs. However, on balance, this Panel finds that a total review of the record shows a preponderance of evidence that Student’s Tourette Syndrome adversely effects educational performance.

First, as general background, the licensed psychologist described Tourette Syndrome in general as a neurological disorder that has generally four component parts which may wax and wane over time: “One being tics, which is the one that gets the most

alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that— (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child’s educational performance.” *Id.*

⁴² Both the District and Parents agree that Student has Tourette Syndrome. The record is replete with testimony by Student’s teachers and mother that student appeared disheveled and was often tired. *See, e.g.*, NT at 29-31, 59, 131. For example, the Spanish immersion teacher, who had known Student since eighth grade noted “much more detrimental physical symptoms this past year than over the past five years. Clearly, just your physical appearance, I think, some days has been much worse than I’ve seen in the past.” NT at 31.

⁴³ Letter to Lillie Felton OSEP 1995.

⁴⁴ *Id.*; *cf.* West Chester Area Sch. Dist.v. Bruce C. 194 F. Supp.2d 417 (E.D.Pa.2002).

⁴⁵ *Id.*

press; another area being difficulty with nonverbal learning and written expression; another being problems with attention, concentration and things of that nature; and then also obsessive compulsive disorder.”⁴⁶

As Parent’s witness noted, Tourette Syndrome varies in terms of its effect on each individual.⁴⁷ This Panel starts by reviewing the documented impact of Tourette Syndrome on Student. First, the IEE included results of neuropsychological tests, including the Halstead-Reitan Neuropsychological Test Battery, which showed mild impairment in non-verbal learning and low average on the test measuring visual scanning/tracking and clerical speed and accuracy. These tests correlate with the slow processing speed as demonstrated on the WISC-IV and corroborated by the District ER on the Woodcock Johnson.⁴⁸

Thus, in Student’s case, the documented impacts of Tourette Syndrome include involuntary tics, slower processing speed and the complication of Obsessive Compulsive Disorder.⁴⁹ The record reflects that Student suppresses tics to the extent possible during the day and must express them to a greater degree in the evenings.⁵⁰ Student occasionally goes to the nurse to relieve tics, which may also occur during testing.⁵¹ Student also requires an excessive amount of time to complete homework.⁵² With regard to the comorbid Obsessive Compulsive Disorder, Student appears to have difficulty filling in bubbles on Scantron tests.

⁴⁶ NT at 99.

⁴⁷ NT at 23-35.

⁴⁸ P-4; SD 13.2 at 11-12. However, the IEE and the District ER vary in their assessment of a non-verbal learning disability.

⁴⁹ NT at 99, 210, 219. The IEE also notes weakness in visual perception of details, visual scanning and tracking speed and clerical speed and accuracy. NT at 99.

⁵⁰ P4; SD-13; NT at 131, 141, 175, 210, 225, 226, 243 and 244.

⁵¹ SD-13 at 5.

⁵² P-4 at 13, 15, 24.

The record also reflects that Student's teachers noted issues with inconsistency in performance and concern for the cost of performance. Student's Spanish immersion teacher noted that Student's "testing scores are lower than all the other projects, the oral projects that we do, and the verbal components, the taped components in the class, homework, of course, is higher."⁵³

The AP psychology teacher testified: "You sit in the very front, so you're sort of forced to pay attention, but often you're not. I don't feel that I have your attention. Sometimes you come in and your eyes look bloodshot, your hair is disheveled. You don't have as neat of an appearance as I'm used to seeing."⁵⁴ She also testified that Student's grades were a "range of scores" which was a "red flag" for her as she is not used to seeing such inconsistency in honor's students.⁵⁵

Furthermore, a review of the District ER shows that the classroom grades reported by teachers generally breakdown such that Student's homework and classroom participation grades are substantially higher than test grades.⁵⁶

Student's Mother further testified that Student stays up until at least midnight or later on a regular basis to complete homework; that tics and OCD have gotten worse; and that Student is at the point of breaking and extremely fragile.⁵⁷ Her testimony is consistent with the licensed psychologist's testimony that the efforts in school will most likely cause "burn out".⁵⁸

⁵³ NT at 31.

⁵⁴ NT at 60.

⁵⁵ *Id.*

⁵⁶ SD-13.2 at 9-11.

⁵⁷ NT at 129.

⁵⁸ NT at 101.

Thus, a fair reading of the entire record and the non-testimonial extrinsic evidence shows that Student suffers from Tourette Syndrome and that it impairs neurological functions at the very least in terms of tics and a slower processing speed, along with the complication of OCD. As schoolwork became more challenging, Student has struggled to complete the work. Even though Student's teachers consistently acknowledged that Student had difficulties in their classes, they agreed that placement was appropriate and in accordance with abilities. While this Panel certainly commends the extreme efforts to maintain grades and to achieve academic success, the Panel nevertheless acknowledges that Tourette Syndrome has adversely impacted Student's educational performance.

In next considering whether Student qualifies as having a Specific Learning Disability, in particular in written expression and reading fluency, this Panel finds close evidence that preponderates in favor of finding the disability. Specific learning disability is defined as follows:

(i) General. The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.⁵⁹

In determining whether a student qualifies as a having a Specific Learning Disability, one possible criteria is whether the Student "exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments"⁶⁰

⁵⁹ 34 CFR § 300.307-11.

⁶⁰ 34 CFR § 300.309.

This Panel finds that the record supports a Specific Learning Disability in written expression and reading fluency. The IEE indicates that Student “evidences significant academic underachievement in relation to . . . ability, however, in written expression” and further that Student is “caught in a double bind in timed test conditions requiring comprehension of read material.” On the WIAT-II, Student struggled with higher-level comprehension, although fluency scores were average to above average. On the Reading Fluency subtest of the Woodcock Johnson III Student had difficulty with fluency but comprehension was flawless. She testified that Student compensates for learning difficulties by taking extended time to ensure good grades.⁶¹

Although the federal regulations caution against using only one test or criteria for diagnosing a Student with Specific Learning Disability, this Panel notes that the licensed psychologist who conducted the IEE testified that she reviewed tons of Student’s work and that her diagnosis is consistent with Student’s history of performing better in oral rather than written testing; of struggles with handwriting and problems with listening in the classroom and taking notes.

Having found that Student meets the criteria for other health impaired and specific learning disability, it is necessary to address the second prong whether there is a need for special education or related services. In terms of special education the question is whether Student requires specially designed instruction, which “means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or

⁶¹ Although the District ER does not support the discrepancy in reading fluency and written expression, it may be as a result of the “practice effect” in that the school evaluation was conducted shortly after the IEE. The school psychologist testified that it could be the practice effect but that she believed the discrepancy to be too large; while the psychologist who conducted the IEE believed that the practice effect could have caused the discrepancy. NT. at 93; 207-13. Both evaluations show slow processing speeds. *Id.* at 210.

delivery of instruction— (i) To address the unique needs of the child that result from the child’s disability.”

“There is no precise standard for determining whether a student is in need of special education, and a well settled precedent counsels against invoking any bright-line rules for making such a determination.”⁶² Furthermore, passing grades or even gifted status do not automatically preclude a need for special education.⁶³

A review of the record shows that, although able to generally function in the regular classroom -- and indeed in honors and other advanced placement courses -- Student has special needs that require specially designed instruction. In this particular case an individually tailored educational program would include modification of homework, teacher’s notes, greater emphasis on oral testing, avoidance of scantron tests and extra time to complete tests. In fact, the District is already implementing many of these components of SDI, thus in effect, admitting that Student is in need of same. For example, the District is providing extra time for tests and a modification of homework assignments. Furthermore, Student should continue to be allowed to go to the nurse’s office to relieve tics.

As an additional matter, the record reflects that Parents requested that the District evaluate Student under the IDEA in June 2006.⁶⁴ Although the record does not reflect that Parents ever withdrew this request, the District apparently inferred that Parents no longer requested the evaluation from comments at a meeting with Parents and from Parents failure to respond to their written request that Parents further identify which areas

⁶² *West Chester Area Sch. Dist. v. Bruce C.*, 194 F. Supp. 2d 417 (2002)(citing *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)).

⁶³ *Id.*; *Conrad Weiser Area Sch. Dist. v. Thomas L.*, 603 A.2d 701 (Pa. Commw. Ct. 1992).

⁶⁴ As this issue was clearly presented in the due process request and raised at hearing, this Panel addresses it under the broad based exceptions filed by the *pro se* Parents.

Student should be evaluated. District did not complete the evaluation until after it received an IEE from Parents.

Under the IDEA, a parent may initiate a request for an evaluation to determine if a student qualifies as a child with a disability.⁶⁵ The evaluation must be conducted within 60 days of receiving parental consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe.⁶⁶

Instantly, Parents requested an evaluation under the IDEA no later than June 13, 2006.⁶⁷ District requested that Parents confirm their request for evaluation and inform the district as to the legal basis for the evaluation. Based upon these actions, Parents lost confidence in District and ultimately sought an IEE.

District did not send out a Permission to Evaluate until one week after it received a copy of the IEE and did not complete its own evaluation until January 2007. Thus, District relied upon the information in the IEE to determine the need to evaluate after neglecting to perform an evaluation upon Parents' initial request. Thus, given the District's failure to comply with the procedures for conducting an initial evaluation, this Panel finds that it is appropriate to require District to reimburse Parents for the cost of the IEE.⁶⁸

Finally, this Panel finds that the appropriate remedy for District's failure to timely identify Student as a child with a disability under the IDEA is compensatory education in the amount of two hours per week from January 3, 2007 until the District prepares an

⁶⁵ 34 CFR § 300.301(b); 20 U.S.C. § 1414(a)(1)(B).

⁶⁶ *Id.* § 300.301(c).

⁶⁷ NT 129.

⁶⁸ The requirements for obtaining an Independent Educational Evaluation at public expense are set forth 34 C.F.R. § 300.502. It should also be noted that the regulatory requirement that Parent express disagreement with a District evaluation is unclear in this jurisdiction. *See, e.g.*, Special Educ. Opinion No. 1808 (2007).

appropriate IEP. In calculating the time frame, this Panel has considered the date that the District received the IEE, as well as the time period that the District would have had to conduct an evaluation and issue an IEP had it acceded to Parents request in June 2006.

Furthermore, this Panel finds that two hours per week should be sufficient to place Student in the same position as if proper and timely identification had occurred. The Parent may select the form of compensatory education so long as it addresses the goals of the Student in future IEPs. Such hours must be in addition to the Student's current IEP and may not be used to supplement such services. The cost to the District for providing the awarded hours of compensatory education should not exceed the full cost of awarded services that were denied. Full cost of the salaries and fringe benefits that would have been paid to the actual professional and paraprofessionals who should have provided the District's services and the actual costs for salaries, tuition, transportation, etc. for contracted services. This principle sets the maximum costs of all the hours or days of compensatory education awarded. The Parent may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. The Parent may also use fewer hours of expensive services so long as the maximum amount is not exceeded.

For the reasons set forth herein, this Panel determines that Student does qualify as a child with a disability under the IDEA and reverses that portion of the Hearing Officer's decision.

ORDER

Accordingly, on this 18th day June 2007, this Panel reverses the decision of the Hearing Officer, as follows:

1. Student is eligible for special education under the IDEA and an appropriate IEP shall be created within 30 school days.
2. The cost of the IEE shall be reimbursed.
3. Compensatory education is awarded to Student in the amount of two (2) hours per week from January 2, 2007 until District prepares an appropriate IEP in accordance with the criteria set forth in the attached opinion and incorporated herein.

Any exceptions not specifically addressed by this Order are dismissed.

Pursuant to 22 PA. CODE §14.162(o), 22 PA. CODE 16.63(l), the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or the appropriate federal district court.

Kay Hennessy Seven, Esquire
for the Appeals Panel

Signed & Mailed: June 18, 2007