

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING
PANEL

In the Matter of)
)
(“Student”)) ORDER AND OPINION
Petitioner,) Hearing Date: 3/15/10
v) Date of Order:3/22/10
CHRISTINA SCHOOL) DE DP 10-4
DISTRICT (“District”))

Student: (“Student”)
Counsel for District: Michael Stafford, Esq. , Young,
Conaway, Stargatt & Taylor, Brandywine Building
17th Floor, 1000 West Street, Wilm., DE 19801

ORDER AND OPINION

I. INTRODUCTION

Student is a 12th Grade Student at “School”¹ with
classes at “VoTech”. Student is classified as deaf and blind.
Student has been diagnosed with Usher’s Syndrome.
Significantly, Usher’s Syndrome typically presents in a
progressive significant visual impairment. Student filed a

¹ Due Process Complaint and Request for Due Process Hearing received 1/6/2010 hereinafter
 (“Complaint”)

two page Due Process Complaint received on January 6, 2010 by the Department of Education and District. District filed its answer on January 14, 2010. On January 12, 2010, District provided Student notice of a resolution meeting for January 21, 2010.

On January 6, 2010, Gary R. Spritz, Esq., (hereinafter “Panel Chair”) Dr. Leon Litow Ph.D., the educational member and Matthew Stankis, a layperson, all who have undergone certification and training in educational law required by the Department of Education of the State of Delaware were appointed the panel to this case.

On January 6, 2010, the Panel Chair notified the parties of a scheduling teleconference for January 14, 2010. District attended through its counsel the January 14, 2010 teleconference and Student neither attended, nor ever offered an explanation as to why he failed to attend.

Accordingly, it was determined to discontinue the teleconference and on January 16, 2010, a mandatory pre hearing conference was scheduled for February 3, 2010 at 820 N. French Street, Wilm., DE 19801.

On February 3, 2010, District attended the pre hearing conference as well as a translator and the Panel Chair. Student did not. Rather, after the Panel Chair returned from the Pre Hearing Conference, the Panel Chair received from District a copy of an email from Student to District where Student requested to “hold the due process until we decide something in an IEP mtg in Feb 5th.” This email was incorporated into the February 3, 2010 Order Following Pre Hearing Conference and treated as Student’s request to continue which was granted and the forty five deadline was continued to March 22, 2010.

Neither Student nor District responded as requested to the February 3, 2010 Order Following Pre Hearing Conference 's request as to status and on February 16 2010, an Order to Show Cause was issued requiring the parties to inform Panel Chair of the status. As a result of this, Student emailed the Panel indicating the IEP meeting previously cancelled on February 5, 2010 and February 23, 2010 and was rescheduled for February 26, 2010.

On February 25, 2010, a Supplemental Pre Hearing Order was entered and a hearing scheduled for March 15, 2010 giving both parties an opportunity for an additional Pre Hearing conference, and indicating to both parties that the issues were only those set forth in the Complaint and District's Answer. Student never prior to March 15, 2010 made a request to Amend the Complaint. District did not request to amend its Answer.

District requested to continue the March 15, 2010 hearing. Student's position as District's request to continue the March 15, 2010 hearing was requested, but not provided. A teleconference was scheduled for March 5, 2010. Student did not participate and District on March 5, 2010 withdrew its request for a continuance and on March 5, 2010, the Panel Chair indicated to the parties the March 15, 2010 hearing as previously scheduled would proceed. On March 10, 2010, Student inquired whether an interpreter would be present at the March 15, 2010 hearing. Student was informed one would be provided and both parties were offered additional times for teleconferences and neither side requested the same.

Importantly, Student never requested to amend his Complaint and District did not request to Amend its answer. That means that both the issues before this panel

and this decision are limited to those set forth in Student's Complaint.

II. FINDINGS OF FACT.

A. Student is classified as deaf and blind. (Student, Transcript at p.6, l.23- p.7, l.1)

B. Student has a need for a visual assessment which was discussed as early as August, 2009. (M. C. Transcript at p.52 l.6 –l.14).

C. District does not have the results of Student's Low Vision Evaluation and District Offered to pay for same if Student's family provided a letter of rejection from their insurance. M. C., Transcript at p.52 l.17 – p.53 l.113). The provision of that letter of rejection is not in the Record. Nor did student indicate he ever provided one.

- D. Student did express that the low vision evaluation wasn't the point. Student, p.65, line 24- p.66, line 1. This tends to show the lack of connection between the absence of this evaluation and the additional weeks Student requests at the Helen Keller National Center.
- E. Student's Mother was asked to share her evaluation as to independent living skills and only provided that information at the close of the last IEP meeting on March 3, 2010. Student's Mother was offered the opportunity to share the results prior to this. (M. C., Transcript at p.87 1.11- 1.18.)
- F. District designed its own Independent Living Skills Assessment using information provided by the Helen Keller Center and a separate test known as the ESTR, III. (M. C., Transcript at p.96 1.12-15.)

G. District at the last IEP offered two weeks at the Helen Keller National Center. D. T. Transcript at p. 109 l. 4-11), one for evaluation and the other for training. (M. C. Transcript at p. 56, 17-10) However, District contends the same is not needed (M. C., p. 56, l. M. C., p. 56, line 22- -.57 line 1.). Regardless these two weeks are now ordered by this Panel as an independent educational evaluation.

H. District's M. C. indicated that while it did not have Mother's results and did not believe Student's Mother's Assessment would provide support for additional time at the Helen Keller Center.

I. D. T. of the District similarly testified that the result of Mother's input would not change the recommendation to afford two weeks at the Helen Keller Center. P.115

- 1.18. D. T. further testified she did not believe another IEP meeting was necessary.
- J. District testified that they never received any information from Student that he had difficulty communicating with the Helen Keller National Center, M. C., and Transcript at p. 58, line 15.).
- K. The Panel had the opportunity to view Student's presentation of the case and all were impressed with his composure and ability to communicate his issue.
- L. While the Panel did not feel the Student at the hearing presented sufficient evidence, at this juncture, to warrant additional time at the Helen Keller National Center, it very well may be the evaluations that Student receives at the Helen Keller National Center, indicates that additional educational services were

required by District and that sort of issue is not before this panel.

III. SUMMARY OF DECISION

District, as offered, shall send Student to the Helen Keller National Center for two (2) weeks. District, at this juncture is not obligated to send Student to the Helen Keller National Center for a total of six (6) to eight (8) weeks. Student has not shown that any additional time at the Helen Keller Center is required. District is Ordered to schedule a low vision evaluation for Student within two (2) weeks of this date without regard to Student's Mother's obligation to provide a rejection letter from Student's Health Insurance.

IV. DECISION

This Panel does not find that at this juncture, Student is entitled to six (6) to eight (8) weeks at the Helen Keller National Center as opposed to two weeks which are ordered. The District established the reasonable nature of its testing procedure and this coupled with its offer of two (2) weeks at the Helen Keller National Center is designed to “catch” any lingering issues that Student may have for a comprehensive evaluation as to Student’s Independent Living Skills.

As a preliminary matter, the scope of this decision is limited to the issues in the Complaint. 14 Delaware Admin. Code 926.11.7 and 926.8.6.2 mandates this.²

² See also 20 U.S.C. Sec. 1415(f)(1)(A), 1415(f)(3)(A)-(D) and 14 Del. C. Sec. 3110, 3137 and 3140

Indeed, 14 Delaware Admin. Code 926.8.6.2 states that the hearing panel is not even allowed to amend the Complaint at least five (5) days before the hearing begins. The hearing began March 15, 2010. That means this Panel does not and cannot consider the Student's requests that the Panel consider the comprehensive failure of the District to provide "independent living skills". Student, Transcript at p.11, line 15. However, that also means that this opinion does not preclude a later appropriate request as to this. That sort of issue is not before this Panel because it is not in the Complaint and no decision is made concerning this issue should there be further proceedings.

As to Student's complaint, Student admits that testing as to Student's Independent Living Skills was done by the District. Student claims the District's testing as to

Independent Living Skills was insufficient in that it failed to adequately focus on Student's visual challenges and an intertwine between deafness and his visual challenges. (Student, Transcript at p.17, lines 1-5).

Student further claims the District's testing as to his independent living skills failed to sufficiently include, "Social Skills, orientation and mobility skills, compensatory functioning skills, independent living skills, recreational skills, career/education, use of effective technology, sensitivity and efficiency skills, self determination skills." Student, Transcript at p.17, lines 21-24. However, Student failed to give specific examples of how the testing given him was deficient in these enumerated areas.

Moreover, the 375 pages of District's Exhibits introduced without objection contradict Student's

argument as to the deficient nature of District's testing. For example, as to social skills, Student is a yearbook editor and Senior Class President (CSD0201). As to self determination skills and career/education, Student works at Acme in addition to his education. As to recreation the ESTR III test shows, 23 questions were on the survey provided to District personnel and Student's Mother. (CSD 0199-201 and CSD 226-228). Of these, the only "0" representing non participation was given to student by his Mother and it concerned a lack of Student's physical activity.

Simply put insofar as the testing, thus far, is completed Student has not shown that it was deficient. Moreover, District is now ordered to provide the two (2) weeks it offered at the Helen Keller National Center as an independent educational evaluation. In so doing, there

is an additional safeguard. That is if District's program as to independent living skills or testing is flawed, District has the future possible issue of a Student Complaint supported by data from an unrelated third party the Helen Keller National Center.

On another note, it is clear that Student suffers from a degenerative condition that may or may not result in decreasing vision. Whether or the Student's visual decline has plateaued is not known. It is not rebutted that Student needs a low vision evaluation. The content of this test is not known as the test was not done. The question remains as to how, if at all, this omission impacts the completeness of District's provision of Student's assessment of Independent Living Skills when no evaluation was done. As to that, Student stated, "The low vision eval, that isn't the point." Transcript at p.65,

line 24. That is Student has offered no evidence of a connection between the lack of a Low Vision Evaluation and the need for an additional four (4) to six (6) weeks at the Helen Keller National Center. This Panel cannot make one. It may very well be the Low Vision Evaluation may shed no additional relevant information as to any further need of Student for Independent Living Skills. Additionally, Student is not blameless in District's failure to provide a low vision evaluation. There is no explanation as to why Student has not submitted the lack of health insurance coverage of prospective low vision evaluation to his insurer and the rejection or acceptance of the same to the District.

Yet, Student's omission does not nullify District's obligation for the Low Vision Evaluation as the primary

obligation for payment belongs to District. 14 Delaware

Admin. Code 923.3.3³ states:

Consistent with 14 DE Admin. Code 925.23.2, each public agency shall ensure that there is **no delay** in implementing a child's IEP, including any case which the payment source for providing or paying for special education **and related services to the child is being determined.**

14 Delaware Admin. Code 922.3.0's definition of "Related Services" includes "medical services for diagnostic or evaluation purposes."

Now whether or not Mother or her insurer has an obligation to pay for the evaluation is not effected by this decision as 14 DE Admin. Code 923.3.2 states " Nothing in these regulations relieves an insurer or other third party from an otherwise valid obligation to provide or pay for services provided to a child with a disability."

Furthermore, a parents' obligation to support under 13 Del. C. Sec. 501 is not before this tribunal. **However,**

³ See also 20 U.S.C. Sec. 1401(8) and 1412(a)(1)

the panel construes these provisions as requiring the low vision test now in that its need was recognized as early as August, 2009. There is no reason to further delay this from a parent or student's cooperation or lack thereof. There is similarly no reason for the IEP not to reconvene as soon as possible after Student sends or causes to be sent by signing a release to District the results of the low vision evaluation.⁴ This is especially the case where there is a history of non cooperation of the parties as in this case.⁵ Should Student fail to provide the result of the "low vision evaluation", to District so it can promptly cause an IEP to be reconvened, the District

⁴ I will suggest but not order that District's Counsel should provide Student with a Release compliant with Green v. Bloodsworth. , *Del. Super.*, 501 A.2d 1257 (1985).

⁵ As evidence of no cooperation, District provided no satisfactory reason as to why it failed to provide its results of the Independent Living surveys to Student until the last IEP meeting (on March 3, 2010) when the same were done in January, 2010. Mother failed to provide the results of survey until after the completion of the meeting. Mother contends that she failed to do so because the parties had agreed to provide them simultaneously at the IEP meeting

would again not be violating Student's right to FAPE in failing not to reconvene an IEP.

The District as any decision maker is entitled to rely upon the information it has to make decision at an IEP, including that which Student and Mother provide or choose not to provide. Susan N. v. Wilson Sch. Dist., 70 F.3d 751 (3d Cir. 1995; Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993). That is a Student who fails to submit information to the District cannot complain later that the District failed to consider the non-disclosed information. This is the flaw in Student's argument that it failed to consider his Mother's survey.

In summary, at this juncture, the two weeks for Student at the Helen Keller National Center which is now ordered is not a violation of FAPE.

Under 14 DE Admin. Code 926.16.0⁶, “ Any party aggrieved by the findings and decision made under 7.0 through 13.0 or 30.0 through 34.0 has the right to bring a civil action...” in the Family Court or the United States District Court, but must do so within ninety (90) days of the Date of this Decision.

Respectfully,

/s/ Gary Spritz /s/ Leon Litow /s/Matthew Stankis
GARY SPRITZ Dr. LEON LITOW MATTHEW STANKIS

Date Decided and Emailed and Mailed: March 22, 2010

⁶ 20 U.S.C. Secs. 1415(i)(2) and (3)(A) and 1415(l).