IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Bolick,	:	
Petitioner	:	
	:	
v.	:	No. 2189 C.D. 2009
	:	Submitted: April 30, 2010
Council Rock School District,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: July 23, 2010

Thomas Bolick (Parent) petitions *pro se* for review of that part of the September 4, 2009, order of the Pennsylvania Special Education Hearing Officer (Hearing Officer) denying Parent's request for compensatory education services for his son, Thomas Bolick III (Student). We affirm.

Student attended high school in the Council Rock School District (District). He was an above-average student getting average grades in the regular school curriculum. Student graduated in June 2008 and attended college for the fall semester, receiving two A's, three B's and a C+. (Findings of Fact, Nos. 1-3.)

Student's guidance counselor from ninth grade through twelfth grade was Joe DeMaio (DeMaio). In January 2006, DeMaio received an email from Parent describing Student as a person with "impaired sensory, manual or speaking skills"

and requesting that Student be considered for educational services under section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act).[1] At the time, Student was taking mostly accelerated academic classes and was earning average grades.[2] DeMaio followed up with Student's teachers, who had no concerns that Student may have a learning disability. DeMaio also scheduled a meeting with Parent and the District's section 504 coordinator. At the meeting, the District decided to refer Student to a child study team for a comprehensive psycho-educational evaluation. (Findings of Fact, Nos. 4-5.)

Tammy Cook (Cook), a school psychologist, evaluated Student on May 22, 2006, when he was in tenth grade. Her initial evaluation report (Initial Report) included Student's standardized test scores for the Wechsler Intelligence Scale for Children, Fourth Edition (WISC) and the Wechsler Individual Achievement Test, Second Edition (WIAT). Cook found that Student did not need specially designed instruction under the Individuals with Disabilities Education Act (IDEA).[3] In making that finding, Cook pointed out that Student's above-average score on the Reading Comprehension section of the WIAT suggested that Student was able to read

[1] 29 U.S.C. §794. Under section 504 of the Rehabilitation Act, no otherwise qualified individual with a disability shall, solely by reason of the disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

[2] Parent asserts that: (1) Student was an honors student who earned A's before high school and then fell to the point where he graduated 426 out of a class of 597; but (2) Student's sister was consistently number one in her class. (Parent's brief at 25.)

[3] 20 U.S.C. §§1400-1487.

materials that were on a post-high school level of difficulty. (Findings of Fact, Nos. 6-9.)

In addition, Cook measured Student's emotional stability using the Behavior Assessment System for Children, Second Edition (BASC). Cook gave the rating scales to Student's teachers and Student's parents for completion. The parents never returned them. The teachers indicated some "at risk" concerns in the areas of social skills, leadership skills and study skills, but Cook found nothing significant. Cook invited Student's parents to discuss the Initial Report, but they did not respond. (Findings of Fact, Nos. 11-12.)

In January or February 2007, Parent hired Kristen Herzel, Ph.D., to conduct an independent psycho-educational evaluation (IEE) of Student. Unlike Cook, Dr. Herzel found that Student's reading comprehension was poor. Dr. Herzel based her conclusion on Student's scores on the Grey Oral Reading Test (GORT), which involves long passages and does not allow the test-taker to re-read passages to answer the questions, and the Nelson-Denny test, which involves brief passages and does allow the test-taker to re-read passages to answer the questions. (Findings of Fact, Nos. 13, 15.) In her recommendations, Dr. Herzel stated that Student's parents "may wish to pursue the possibility of having him classified as a student with a specific learning disability in the area of … reading comprehension."[4] (S.R.R. at 105b.)

[4] Dr. Herzel's evaluation shows that, according to Student's mother, Student does not like to read, except for sports magazines and player manuals for video games. (S.R.R. at 107b.) Student told Dr. Herzel that he thought he was struggling in school "because he spent so much time at

(Footnote continued on next page…)

Thomas C. Barnes, Ph.D., the school psychologist for the District's high school, reviewed Dr. Herzel's IEE. Dr. Barnes considered the GORT and Nelson-Denny test to be reading "screeners," i.e., tests used to determine whether a student needs further testing for a learning disability. According to Dr. Barnes, to determine whether a student has a learning disability, it is necessary to test cognitive ability as well as reading achievement, and the WISC and WIAT accomplish that purpose. Dr. Barnes considered the low reading comprehension scores on the GORT and the Nelson-Denny test as statistical "outliers" because they were not close to Student's results in other reading comprehension tests. Dr. Barnes also noted that, from ninth grade to twelfth grade, Student showed modest improvement without special services. Dr. Barnes believed that Student was an above-average student getting some below-average grades because his parents insisted that he take the honors and accelerated classes in disregard of his teachers' recommendations. (Findings of Fact, Nos. 16-17.)

By letter dated April 10, 2007, Dr. Barnes informed Student's parents that the child study team concluded that Student did not have a learning disability. (S.R.R. at 118b-19b.) On May 26, 2009, Parent filed a complaint with the Office of Dispute Resolution, seeking an impartial due process hearing on whether the District properly evaluated Student and, if not, whether the District provided Student a free

(continued…)

basketball practice and couldn't spend as much time as he might on homework and studying." (S.R.R. at 108b.)

appropriate public education (FAPE). The Hearing Officer was assigned to dispose of the matter.

Because Parent had filed the complaint, the Hearing Officer placed the burden of proof on Parent. After considering the evidence presented, the Hearing Officer found that Dr. Herzel's IEE contained significant shortcomings because she failed to consider: (1) the difference between Student's GORT and Nelson-Denny scores and Student's WIAT and PSSA[5] scores; and (2) the fact that Student made meaningful progress in school without specially designed instruction. The Hearing Officer also found Cook's Initial Report deficient, but the Hearing Officer concluded that, based on the evidence presented at the hearing, the District properly determined that Student did not have a learning disability and did not deprive Student of a FAPE. Because of the defects in the Initial Report, the Hearing Officer ordered the District to pay Parent for the expense of Dr. Herzel's IEE. Parent now petitions this court for review of the Hearing Officer's decision.[6]

Initially, we note the District's observation that Parent's *pro se* brief "is essentially a stream of consciousness that makes it difficult if not impossible to address the issues contained therein…." (District's brief at 1-2.) The District also

[5] PSSA stands for the Pennsylvania System of School Assessment. Student's score on the reading portion of the PSSA was in the "Advanced" range. (Adjudication at 12 n.17.)

[6] Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed or whether the necessary findings of fact are supported by substantial evidence. *E.N. v. M. School District*, 928 A.2d 453 (Pa. Cmwlth. 2007), *appeal denied*, 596 Pa. 748, 946 A.2d 689 (2008).

points out that the issues set forth in Parent's "Statement of the Question Involved" do not correlate to the headings within the body of the "Argument." (District's brief at 2.) We agree with the District's assessment of Parent's *pro se* brief.[7] However, the District does not ask this court to dismiss Parent's petition for review under Pa. R.A.P. 2101 (stating that if the defects in an appellant's brief are substantial, the appeal may be dismissed). To the extent we can ascertain the issues Parent raises and the arguments Parent makes, we shall address them.

Parent argues that the Hearing Officer erred in placing the burden on Parent to prove that the District deprived Student of a FAPE. We disagree. In *E.N. v. M. School District*, 928 A.2d 453 (Pa. Cmwlth. 2007), *appeal denied*, 596 Pa. 748, 946 A.2d 689 (2008), this court held that, because the gifted child regulations are silent regarding the burden of proof at a due process hearing, general administrative law procedures apply, so that the initial burden of proof is on the moving party. Here, like the gifted child regulations, the special education services regulations are silent regarding the burden of proof at a due process hearing. *See* 22 Pa. Code §14.162 and 34 C.F.R. §300.511 (relating to the due process hearings). Thus, because Parent filed the complaint with the Office of Dispute Resolution, Parent had the initial burden of proof.

[7] We note that some of the arguments Parent makes in his *pro se* brief and reply brief display little, if any, real understanding of the issues and law governing our review of this matter. For instance, Parent incorrectly asserts in his reply brief that "Commonwealth Court is the fact-finding body and that [we] must make an independent review of the evidence." (Parent's reply brief at 20.) Also, much of Parent's argument is an attack on the Initial Report, although the Hearing Officer ruled in Parent's favor on that issue.

Parent next argues that the Initial Report was fraudulent because it contained a misrepresentation of fact which the District knew to be false, which the District used to deceive Parent and which induced Parent to take action. (Parent's reply brief at 3.) Parent does not clearly identify the misrepresentation of fact or the action it induced Parent to take. To the extent Parent argues that the Initial Report misrepresents that Student has no learning disability and that such misrepresentation induced Parent to hire Dr. Herzel to do an IEE, the Hearing Officer already has awarded Parent the cost of the IEE.

Parent also contends that, because "fraud vitiates everything that it touches," the testimony of Dr. Barnes, which was based on information in the Initial Report, could not "resurrect the fraudulent initial evaluation." (Parent's reply brief at 3.) To the extent this argument is premised on Parent's belief that the Initial Report is fraudulent because it misrepresents that Student has no learning disability, Parent cannot prevail. The Hearing Officer found that the District's Initial Report **correctly** represented that Student has no learning disability. The Hearing Officer determined that the Initial Report was deficient only because it did not properly justify its conclusion that Student has no learning disability.

Parent asserts that the Initial Report misrepresents the contents of a January 13, 2006, letter that Parent sent to the District. According to Parent, the letter stated that Student has a hidden disability and referred the District to the case of *Bolick v. Flite* (C.P. Phila., No. 2905, September term 1998). In the Initial Report, Cook wrote that Parent stated in the letter that, according to *Bolick v. Flite*, Student "received a dog bite that has made him afraid of learning." (R.R. at 60.) However, at

the hearing, Parent questioned Cook about the letter, attempting unsuccessfully to elicit an admission from Cook that she made a mistake in representing its contents in the Initial Report. (S.R.R. at 33b.) Moreover, the District objected to any questions about *Bolick v. Flite*, and the Hearing Officer sustained the objection.[8] Because the record does not support Parent's contention that Cook misrepresented the letter in the Initial Report and because Parent does not develop any argument suggesting that the Hearing Officer improperly sustained the District's objection to questions about *Bolick v. Flite*, we decline to address the matter further.

Parent argues that the Hearing Officer erred by failing to consider Dr. Herzel's IEE. We disagree. The regulation at 34 C.F.R. §300.502(c) (emphasis added) provides:

> (c) Parent-initiated evaluations. If the parent … shares with the public agency an evaluation obtained at private expense, the results of the evaluation –
>
> (1) Must be considered by the public agency, **if it meets agency criteria**, in any decision made with respect to the provision of FAPE to the child; and

[8] The District objected as follows:

> I'm going to object again to the reference to this Philadelphia action almost ten years prior to this evaluation, to it having any relevance. It was not submitted to the School District to review. It was not even provided to their own expert that they presented today, Dr. Herzel. So I don't know why we continue to go over and over this 1998 litigation of some evaluation that I've never seen. I don't know who the expert was. I can't cross examine them. And I'm objecting to any line of questioning on that.

(S.R.R. at 36b.)

> (2) May be presented by any party as evidence at a hearing on a due process complaint … regarding that child.

Here, the District did not consider Dr. Herzel's IEE because it did not meet the District's criteria, i.e., because it relied upon reading comprehension screening tests rather than tests that examined cognitive ability as well as reading achievement.[9]

Parent contends that the Hearing Officer erred in concluding that any procedural violations involving the Initial Report constituted harmless error. According to Parent, the harm caused by the Initial Report was that Student had to complete high school without special education services. However, the Hearing Officer found that Student did not have a learning disability requiring special education services. Based on that determination, Student was not harmed; thus, the Hearing Officer correctly stated that any procedural violations constituted harmless error.

Finally, Parent argues that the Hearing Officer ruled against him because the Hearing Officer "disliked" him. In making this argument, Parent relies on the following *dicta* by the Hearing Officer:

> Parent's inconsistent follow through[16] and his consistent misuse of terms and procedures, did not work to his son's benefit in the end.

[9] We note that Parent does not address in his briefs the reasons given by Dr. Barnes for rejecting Dr. Herzel's IEE. Parent asserts only that Dr. Barnes simply put his "spin" on the facts without ever interviewing Student or Parent and without being aware that Student's sister was consistently number one in her class. (Parent's brief at 25.)

> [16]The record reveals that Parent missed many opportunities to participate in meetings in a cooperative way and utilize the educational process delineated in [the law].
>
> This hearing officer appreciates the passion this Parent has for his son but feels obligated to point out that a more cooperative, less accusatory approach might have been more effective.

(Adjudication at 9.) We disagree that this statement establishes that the Hearing Officer "disliked" Parent. In stating that Parent could have been more cooperative, the Hearing Officer was simply referring to the fact that Parent did not return the BASC rating scales Cook sent to him for completion and consideration in the Initial Report and that Parent did not respond to Cook's invitation to discuss the Initial Report.

Accordingly, we affirm.

_____

ROCHELLE S. FRIEDMAN, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Bolick, Petitioner	:	
v.	:	No. 2189 C.D. 2009
Council Rock School District, Respondent	:	

O R D E R

AND NOW, this 23rd day of July, 2010, the order of the Pennsylvania Special Education Hearing Officer, dated September 4, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge