

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

W.E.B., a minor child,)
)
 Plaintiff,)
)
 v.) C.A. No. 01-499-SLR
)
 APPOQUINIMINK SCHOOL DISTRICT,)
 and THE STATE OF DELAWARE)
 DEPARTMENT OF EDUCATION,)
)
 Defendants.)

Collins J. Seitz, Jr., Esquire and Gwendolyn M. Lacy, Esquire of
Connolly, Bove, Lodge & Hutz, LLP, Wilmington, Delaware. Counsel
for Plaintiff.

David H. Williams, Esquire and Jennifer L Brierley, Esquire of
Morris, James, Hitchens & Williams, LLP, Wilmington, Delaware.
Counsel for Defendant Appoquinimink School District. Louann
Vari, Esquire of the Department of Justice, Dover, Delaware.
Counsel for defendant Delaware Department of Education.

MEMORANDUM OPINION

Dated: July 8, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On July 23, 2001, plaintiff W.E.B., a minor child, filed this action against defendants the Appoquinimink School District (the "School District") and the State of Delaware Department of Education (the "Department") seeking review of an adverse determination from an administrative due process hearing held by the Department pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. This court has jurisdiction pursuant to 20 U.S.C. § 1415(i)(3)(A) and 28 U.S.C. § 1331. Presently before the court is plaintiff's motion to supplement the administrative record. (D.I. 63)

II. BACKGROUND

Plaintiff W.E.B. is a minor child identified as having a learning disability under the IDEA. During the 2000-2001 school year, plaintiff attended the 7th grade at Middletown Middle School in defendant Appoquinimink School District, located in and around Middletown, Delaware. In February 2001, plaintiff's parents removed him from the Middle School citing defendant's failure to prevent daily harassment and bullying of their son. On February 5, 2001, plaintiff's parents requested an administrative due process hearing from the Department.

In May 2001, the Department held four days of hearings pursuant to 14 Del. C. § 1335 et seq. at which 13 witnesses testified and the panel received extensive documentary evidence

and argument from the parties. Plaintiff was represented at the hearing by his parents following their dismissal of their previous attorneys. Plaintiff's parents chose not to call plaintiff. On July 20, 2001, the panel issued a decision adverse to plaintiff.

On July 23, 2001, plaintiff filed this action seeking an appeal from the adverse ruling pursuant to 20 U.S.C. § 1415(i)(2)(A). (D.I. 1) On September 19, 2001, the court issued an order requiring plaintiff to obtain counsel and referred the case to the Federal Civil Panel. (D.I. 18, 22) After nearly a year, plaintiff's case was accepted by its present counsel who subsequently filed a motion to enforce the IDEA's stay put requirement. (D.I. 31, 34) On November 21, 2002, the court issued a memorandum opinion granting plaintiff's motion pending the outcome of the litigation in this court. (D.I. 47) The District has subsequently arranged for homebound instruction, which plaintiff has been receiving at public expense since December 2002.

III. DISCUSSION

Plaintiff now seeks to supplement the administrative record pursuant to 20 U.S.C. § 1415(i)(2)(B), which states that a court reviewing an administrative determination "shall hear additional evidence at the request of a party." In his request, plaintiff seeks to introduce additional testimony from six witnesses who

testified previously at the hearing, and receive additional testimony from an expert, who also testified in the initial proceeding. In support of his argument, plaintiff argues that he was represented by his parents at the hearing and that additional relevant evidence may be ascertained by counsel from the previous witnesses. Additionally, plaintiff and his father would like to testify now to supplement the record. Finally, plaintiff would like to recall his expert from the hearing to update the court on his progress since the hearing.

Defendants object to the new testimony as cumulative and irrelevant, and argue that plaintiff and his father had the opportunity to testify at the hearing and chose not to. To allow the additional testimony at this stage would serve no constructive purpose to the court and would essentially be an improper de novo proceeding.

On appeal from an administrative panel, the court applies a modified form of de novo review. Murray v. Montrose County Sch. Dist., 51 F.3d 921 (10th Cir. 1995); see Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993). Pointing out the fact that federal courts have no particular expertise in educational policy, the Supreme Court has instructed courts to give "due weight" to the administrative proceedings. Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). The purpose of the "due weight" obligation is to prevent the court from imposing

its views regarding educational methods on the states. Oberti, 995 F.2d at 1214. When engaging in judicial review under the IDEA, the court has discretion to determine what constitutes "additional evidence" under the statute. Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 760 (3d Cir. 1995). Courts have construed the word "additional" in the ordinary sense meaning supplemental. Perrin v. United States, 444 U.S. 37, 42, (1980); Burlington v. Department of Educ., 736 F.2d 773, 790 (1st Cir. 1984).

Thus construed, this clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely inconsistent with the usual meaning of 'additional.' The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing. The starting point for determining what additional evidence should be received, however, is the record of the administrative proceeding.

Burlington, 736 F.2d at 790. A lax interpretation of "additional evidence" would "reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial de novo." Springer v. Fairfax County Schoolboard, 134 F.3d 659, 667 (4th Cir. 1998) (citing Roland M. v. Concord Sch. Comm., 910 F.2d 983, 997 (1st Cir. 1990)).

The court concludes that additional evidence from the six witnesses that testified during the hearing would be largely

cumulative and, therefore, plaintiff's motion is denied with respect to these witnesses. While the court is cognizant that plaintiff essentially acted pro se during the administrative hearing, this was a choice made by the party. Plaintiff voluntarily dismissed his counsel prior to hearing. Furthermore, there is no evidence that plaintiff did not have an opportunity to fully present his case to the panel. The Department served over 30 subpoenas at plaintiff's request and, ultimately, gave plaintiff four days of hearings at which he examined thirteen witnesses and submitted voluminous documentary evidence. In fact, the record illustrates that the Department has more than accommodated plaintiff's requests and provided a procedurally sound process.

With respect to new testimony from plaintiff and his father, the court shall grant plaintiff's motion. Neither testified during the initial proceeding and the court will give some latitude to the pro se plaintiff on this issue. Now that plaintiff has counsel, relevant evidence may be ascertained from the testimony of these witnesses.

With respect to additional testimony from plaintiff's expert, the court concludes that any new evidence related to plaintiff's progress since the hearing would be irrelevant to the ultimate issue and, therefore, plaintiff's motion with respect to this witness is denied.

IV. CONCLUSION

For the reasons stated, plaintiff's motion to supplement the administrative record is granted in part and denied in part. An appropriate order shall issue.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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O R D E R

At Wilmington, this 8th day of July, 2003, consistent with
the memorandum opinion issued this same day;

IT IS ORDERED that plaintiff's motion to supplement the
administrative record is granted in part and denied in part.

Sue L. Robinson
United States District Judge