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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: J.T.

Date of Birth: [redacted]

Dates of Hearing:

April 7, 2014

April 16, 2014

CLOSED HEARING

ODR Case # 14665-1314KE

Parties to the Hearing:

Parent[s]

Moon Area School District
8353 University Boulevard
Moon Township, PA 15108

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Jonathan Steele, Esquire
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May 5, 2014

May 20, 2014

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] is a [teenaged] student residing in the Moon Area School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹. The student has been identified under the terms of IDEA as a student with autism and an intellectual disability. Since enrollment in the District, the student has attended a private placement. Parents claim that the student has been denied a free appropriate public education (“FAPE”) in the least restrictive requirement (“LRE”), as required under IDEA and Pennsylvania special education regulations. Parents seek to enroll the student in District schools.

The District counters that the private placement is the LRE. Its position is that, owing to the student’s profound needs, the private placement is not only reasonably calculated to provide FAPE to the student but is necessary for the student to continue to make educational progress. In effect, the District argues that a District-based placement would be less restrictive for the student but would come at the price of appropriateness and progress.

¹ It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

For the reasons set forth below, I find in favor of the District. The order will also contain certain explicit directives to the student's individualized education plan ("IEP") team.

ISSUES

Is the private placement
the least restrictive environment for the student?

If not,
are parents entitled to any remedy?

FINDINGS OF FACT

- (1) In August 2007, after relocating with parents from another state to a nearby school district, the student was enrolled in the private placement, a non-residential approved private school. (School District Exhibit ["S"]-2, S-3, S-4; Notes of Testimony ["NT"] at 125-130).
- (2) In late October 2007, the family relocated to the District. In November 2007, the parents and District continued to maintain the student's enrollment in the private placement. (S-5; NT at 78-81, 134-135).
- (3) From November 2007 through the date the record in this matter closed, the student remained enrolled at the District and

continued in the private placement. (See generally Parents Exhibit ["P"]-5).²

- (4) In October 2011, the student was re-evaluated. (P-6 at pages 1-16).
- (5) In the October 2011 re-evaluation report ("RR"), the student was formally assessed using a number of measures in development, functional academics, speech and language, self-care/independent living skills, occupational therapy, and sensory processing. (P-6 at pages 1-5).
- (6) Teacher recommendations in the October 2011 RR included a structured and consistent daily setting, with all curriculum modified to address functional skills of daily living. Related services such as occupational therapy and speech and language therapy were recommended for small group and one-on-one settings "to promote functional activities and communication skills". (P-6 at page 5).
- (7) In the October 2011 RR, the student's strengths were noted as: generally happy and pleasant, responding well to praise, willingness to interact with peers and adults, development of gross and fine motor skills, self-care independence in many tasks,

² Parents' claim for compensatory education remedy was limited, by allegation, to two years prior to the filing date of the complaint (February 5, 2014), or February 5, 2012. Therefore, an in-depth consideration of the student's IEPs begins with the educational program in place in February 2012. (P-5 at pages 48-70; NT at 24-25).

sorting and matching skills, and functional verbal requests to make known wants and needs. (P-6 at page 6).

- (8) In the October 2011 RR, the student's needs were noted as: improving functional money skills, sight word vocabulary, reading comprehension, overall language skills, writing skills, and shoe-tying skills; and expanding spontaneous requests involving 2+ word phrases. (P-6 at page 6).
- (9) In October 2011, the student's IEP team met for the student's annual IEP review. As of February 2012, the October 2011 IEP governed the student's educational programming. (P-5 at pages 48-70).³
- (10) The October 2011 IEP utilized extensive data from the October 2011 RR for the student's present levels of functional performance. (P-5 at pages 51-56).
- (11) The October 2011 IEP contained seven goals: two in speech and language (spontaneous requests, vocabulary), two in reading (reading comprehension, sight word vocabulary), one in money skills, and two in occupational therapy (shoe-tying, writing first/last name). (P-5 at pages 59-66).
- (12) The October 2011 IEP provided extensive specially designed instruction and program modifications, related services, and

³ *Id.*

supports for personnel at the private placement. (P-5 at pages 67-68).

(13) The October 2011 IEP indicated that the student qualified for extended school year (“ESY”) services. (P-5 at 68).

(14) The October 2011 IEP recommended that the student continue at the private placement (a non-residential approved private school), namely in full-time life-skills support. (P-5 at 69-70).

(15) Over the course of the 2011-2012 school year, the student made significant progress on all seven IEP goals in the October 2011 IEP. (P-10 at pages 82-103).

(16) In the summer of 2012, the student attended a camp-based program for ESY services. (P-1).

(17) In the 2012-2013 school year, the student returned to the private placement.

(18) In October 2012, the student’s IEP team met for the student’s annual IEP review. (P-5 at pages 71-96).

(19) The October 2012 IEP contained updated data for the student’s present levels of functional performance. (P-5 at pages 74-77, 80).

(20) The October 2012 IEP contained present levels of performance related to the student’s transition planning, as well as

preliminary transition considerations, for the student. (P-5 at pages 78-81).

- (21) The October 2012 IEP contained seven goals: two in speech and language (spontaneous requests, articulation/intelligibility), two in reading (reading comprehension, sight word vocabulary), one in money skills, one in life-skills independence (item-gathering from a list), and one in occupational therapy (writing address/phone information). (P-5 at pages 82-91).
- (22) The October 2012 IEP provided extensive specially designed instruction and program modifications, related services, and supports for personnel at the private placement. (P-5 at pages 91-93).
- (23) The October 2012 IEP indicated that the student continued to qualify for ESY services. (P-5 at 93-94).
- (24) The October 2012 IEP recommended that the student continue in full-time life-skills support at the private placement. (P-5 at 94-96).
- (25) Over the course of the 2012-2013 school year, the student continued to make significant progress on all seven IEP goals in the October 2012 IEP. (P-10 at pages 107-137).
- (26) In June 2013, the private placement issued progress reports which documented the student's achievement on IEP goals as of

the end of the school year, including an explicit revision of the sight word goal. (P-5 at 97-98; P-10 at pages 127-137).

(27) In May/June 2013, one of the student's parents engaged in telephone conversations where the family voiced dissatisfaction with the private placement and an interest in having the student leave the private placement and, ultimately, to attend a District-based placement. (P-8, P-11; NT at 64-65, 85-89, 167-168).

(28) In July 2013, parents consulted with a parents' advocacy organization regarding the student's attendance at the District and communicated with the District about their desire for changing the student's placement. (P-9, P-11).

(29) In the summer of 2013, the student did not return to the camp-based ESY program. (NT at 170).

(30) In the 2013-2014 school year, even as the parents and District worked through issues related to the student's education program, the student returned to the private placement.

(31) In September 2013, the District requested permission to re-evaluate the student, including a functional behavior assessment ("FBA"). (S-6).

(32) In October 2013, the District issued a RR. (P-6; S-7).⁴

⁴ Both parties produced copies of the October 2013 RR. The parents' copy at P-6 appears to be incomplete; the District copy at S-7 contains integral pages that are not contained in P-6. Therefore citation to the October 2013 RR will be made to S-7.

- (33) The October 2013 RR included extensive assessments in transition issues, visual-motor functioning, sensory processing, functional academics, development, picture vocabulary, speech and language/articulation, and verbal behavior (requesting, labeling, listening, visual perception, academic skills, and socialization), cognitive, achievement, behavioral, adaptive behavior, and autism disorder evaluation. (S-7 at pages 1-6, 10-15).
- (34) The October 2013 RR contained a FBA, undertaken by a behavioral specialist. (S-7 at pages 8-9).
- (35) The FBA in the October 2013 RR observed that the student exhibited inappropriate behaviors (vocalizing, screaming, whining, and occasional pinching) when attempting to gain access to a preferred item, or to escape a demand, and during changes/transitions without preparation. The student also exhibited sensory regulation difficulties (gagging, self-stimulation, fidgeting). (S-7 at pages 8-9).
- (36) The FBA in the October 2013 RR recommended a number of recommendations. (S-7 at page 9).
- (37) Behavioral assessment in the October 2013 RR utilized the Behavior Assessment System for Children, with parent and a teacher responding. Parent rated the student as clinically significant for withdrawal, social skills, and functional

communication. The teacher rated the student as clinically significant for school problems composite, behavior symptoms index, learning problems, atypicality, withdrawal, and functional communication. (S-7 at page 13).

(38) The October 2013 RR concluded that the student should continue to be identified as a student with autism and intellectual disability. (S-7 at page 15).

(39) In November 2013, an independent educational evaluation (“IEE”) report was issued. (P-4).

(40) The November 2013 IEE confirmed the results and conclusions of the student’s evaluation history at the District. (P-4, P-6; S-7).

(41) The November 2013 IEE confirmed that the student exhibited, in the testing environment, significant needs in expressive communication (P-4 at pages 5-6).

(42) The November 2013 IEE confirmed, in the words of the report, “deficient” cognitive and achievement testing results. (P-4 at pages 6-8).

(43) The November 2013 IEE also contained neuropsychological, behavioral, social, and adaptive functioning assessments which largely reflected data consistent with previous evaluations. (P-4 at pages 8-12).

(44) In the November 2013 IEE, the private evaluator could not, and did not, “identify one ‘best’ option” for the student’s educational placement. The main thrusts of the evaluator’s conclusions, though, were two-fold:

“The IEP team is urged to place primary emphasis on the setting(s) and services that allow for the greatest intensity of focus on a life-skills oriented curriculum that is modified to the extent necessary to allow for significant amounts of daily instruction and practice in communication skills such as through assistive technology devices”; and

“It cannot be emphasized enough that development of improved skills in communication will play a **critical** role in helping (the student’s) IEP team to most effectively address (the student’s) needs in a variety of ways.”

(P-4 at pages 12-15, emphasis in the original).

(45) In December 2013, the parties agreed to certain revisions related to speech and language (length-of-utterance), reading (sight word vocabulary), and occupational therapy (writing address/phone information). (S-8).

(46) In January 2014, the student’s progress reports indicated that the student was making progress. (P-10 at pages 138-147).

(47) In early February 2014, parents filed the complaint which led to these proceedings. (Hearing Officer Exhibit 1).

(48) All witnesses, including the District pupil services director, one of the student’s parents, two teachers at the private

placement, a speech and language therapist at the private placement, and a private placement administrator, testified credibly. (NT at 34-170, 125-180, 181-248, 254-320, 321-356, 362-404).

(49) Heavier weight was accorded to the testimony of the two special education teachers and the speech and language therapist, who deliver(ed) instruction and therapy to the student in an educational setting. Each testified credibly that, in their opinions, a District-based placement would not allow the student to progress and would not be appropriate for the student. (NT at 181-248, 254-320, 321-356).

(50) The administrator of the private placement testified credibly that some of the testimony related to the dissatisfaction of the parents with the private placement was the first time the witness had heard of such dissatisfaction and that it came as a surprise to the witness. The witness described the relationship between the family and the private placement, while not grounded in “animosity”, as “tenuous” and “uncomfortable”. (NT at 64-65, 85-89, 167-168, 401-404).

DISCUSSION AND CONCLUSION OF LAW

FAPE in the LRE

To assure that an eligible child receives FAPE,⁵ an IEP must be “reasonably calculated to yield meaningful educational...benefit and student or child progress.”⁶ “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,⁷ not simply *de minimis* or minimal education progress.⁸

Moreover, both federal and Pennsylvania law require that the placement of a student with a disability be in the LRE, considering the full range of supplemental aids and services that would allow a student to receive instruction and make progress in the LRE.⁹ Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the

⁵ 34 C.F.R. §300.17.

⁶ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁷ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁸ M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

⁹ 34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3^d Cir. 1993).

use of supplementary aids and services cannot be achieved satisfactorily.”

Additionally, to comply with LRE mandates, the school district must ensure that “unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.”¹⁰

Pennsylvania special education regulations mirror this emphasis on LRE. Where a student “can, with the full range of supplementary aids and services, make meaningful education progress on the goals in...the IEP”, a school district cannot require separate schooling for a student.¹¹ Similarly, “(a) student may not be removed from...(a) placement in a regular education classroom solely because of the nature or severity of the student’s disability, or solely because educating the student in the regular education classroom would necessitate additional cost or for administrative convenience.”¹²

As is often the case in disputes centered on LRE, the statutory phrase “maximum extent appropriate” is the crux of the dispute. One party focuses on the need for inclusion, as close and as much as possible to the regular education environment, to the “maximum extent”; the

¹⁰ 34 C.F.R. §300.116(c).

¹¹ 22 PA Code §14.145(3).

¹² 22 PA Code §14.145(4).

other party focuses on whether and to what degree such inclusion is “appropriate”.¹³

In this case, the student attends a private placement which is more restrictive than a District-based placement. However, the record strongly supports a finding that the private placement, while more restrictive, is still the LRE for the student, given the student’s complex needs in the educational environment.

As pointed out by the independent evaluator, and bolstered through the testimony of the witnesses from the private placement, the needs of the student are most appropriately met, and have been met, in the private placement. The full constellation of the services in the private placement, including class size, class structure, the ability to focus on highly-segmented scheduling/prompting/cuing/transition, are appropriate for the student. It is the considered opinion of the hearing officer that the student’s marked and consistent progress on IEP goals would be jeopardized by a District-based placement. This risk—i.e., that the student’s program and progress tip into inappropriateness—outweighs arguments that the student’s placement should be changed to the admittedly less restrictive District-based placement.

Accordingly, the student has been provided with FAPE in the LRE, and the parents are not entitled to remedy.

¹³ 34 C.F.R. §300.114(a)(2).

Directives to the IEP Team

The record revealed a potential strain between the parents and the private placement. The word “potential” is utilized because it is unclear whether this is accurate. And, if it is accurate, it is unclear whether the strain rises to the level that the parents and the private placement (which is not a party to the dispute and is not statutorily responsible for the provision of FAPE to the student but is, obviously, the direct provider of instruction and services) can continue to engage in a fruitful relationship regarding the student’s education.

Therefore, the student’s IEP team will be ordered to convene to consider the student’s educational program and placement. The private placement has been, and on this record continues to be, appropriate for the student. Whether or not the student should continue to be enrolled at this particular private placement given the stance between the parents and the private placement, however, needs to be explicitly considered by the IEP team.

CONCLUSION

At all times, on this record, the student has been provided with FAPE in the LRE through the program at the private placement.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, on this record, the School District has at all times provided to the student a free appropriate public education in the least restrictive environment through the student's private placement.

Within 20 days of the date of this order, the student's IEP team shall convene to discuss the student's program and placement and shall consider explicitly whether or not the IEP team agrees, or not, that the student should continue at this particular private placement.

Regardless of the ultimate placement decided on by the IEP team, the IEP team also shall consider explicitly the recommendations of the November 2013 independent educational evaluation.

Any claim not specifically addressed in this decision and order is denied.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

May 20, 2014