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DECISION

Due Process Hearing for K.K.

ODR File No. 5786/05-06 KE

Date of Birth: xx/xx/xx

Dates of Hearing: October 20, December 1, December 2, 2005 – Closed Hearing

Parties to the Hearing:

Parent(s)

Central Bucks School District
16 Weldon Drive
Doylestown, PA 18901

Hearing Officer: Debra K. Wallet, Esq.

Date of Decision: January 7, 2006

Representative:

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BACKGROUND:

Student [hereinafter Student] is an 18-year-old (date of birth xx/xx/xx) in twelfth grade at [Redacted, hereinafter Private School]. Her Parents reside within the Central Bucks School District [hereinafter School District] where Student attended from kindergarten through March 2005, at which time Parents enrolled her in Private School for the balance of the eleventh-grade year.

Student was a severely premature baby weighing 1 pound 4 ounces at birth. She experienced many problems as a newborn and spent five months in intensive care. Student received physical therapy until three years of age followed by occupational therapy until age 12. Her medical history included ear infections, pneumonia, and strep infections. Student has been diagnosed with hyperacusis, an extreme sensitivity to sound, and other sensory abnormalities such as an intolerance to fabrics, particularly tags in her clothing. To counteract her over-reactivity to sound, she wears special “white noise” devices in both ears. She has residual cerebral palsy and a motor tic disorder. (N.T. 245, 248; P-1, p. 2). Student’s relevant diagnoses include: non-verbal learning disorder, severe sensory integration deficits, and a social anxiety disorder. (SD-5, p. 2).

Student was placed in special education in 4th grade. (N.T. 247). The School District initially identified Student as being in need of specially designed instruction for disability category “Other Health Impaired” and later “Specific Learning Disability.” (SD-1, p. 10; SD-5, p. 12).

Student is of average intelligence, but she has a complicated learning profile including ADHD, an anxiety disorder, and significant learning disabilities, particularly in math, relating to brain damage during the neonatal period. (S-4, p. 5).

Parents argue that for some time the School District has not been meeting all of Student's needs, particularly those relating to her extreme anxiety and the auditory and sensory processing disorders, and that they have been required to seek a more appropriate program. They request tuition and transportation reimbursement beginning September 2005, as well as the costs of expert witnesses' preparation and testimony.

The School District maintains that the IEPs for the eleventh and twelfth grade years were appropriate and constituted a free appropriate public education (FAPE). The District further maintains that the Private School is not appropriate and does not constitute the least restrictive environment for Student. Finally, the District argues that Parents are not entitled to reimbursement for the presentation of expert testimony in this due process hearing.

ISSUES:

1. Did the School District provide Student with a free appropriate public education (FAPE) based upon the June 2005 Individualized Education Program (IEP), as revised?
2. If the IEP was not appropriate, is Student entitled to reimbursement for tuition, transportation, and other expenses at the Private School?
3. Is Student entitled to expert witness fees?

FINDINGS OF FACT:

Background

1. Student is a xx-year-old (date of birth xx/xx/xx) twelfth-grade student resident in the School District but currently enrolled at the Private School.

2. On August 18, 2005, by letter from their legal counsel, Parents gave notice that they were requesting a due process hearing and asked that the School District pay the Private School tuition and transportation. Placement issues were resolved through June 2005.
3. Within the initial thirty-day period, no resolution had been reached and the first hearing was scheduled for October 20, 2005.
4. Both parties participated in a pre-hearing telephone conference before the undersigned Hearing Officer on September 28, 2005. The parties generally agreed on the legal issues.
5. Closed hearings were held on October 20, December 1, and December 2, 2005, at which time the record was closed for the submission of evidence but held open for the submission of closing arguments on or before a December 23, 2005 due date. Both parties submitted timely written arguments.
6. The long span between October 20 and the two December dates resulted from unavoidable scheduling difficulties with witnesses, particularly the experts, and counsel.
7. The Hearing Officer heard testimony from five School District witnesses including the school psychologist, principal, learning support teacher, emotional support teacher, and an occupational therapist. Both parents testified and presented testimony from Student's treating pediatric neurologist, psychologist, and occupational therapist. An evaluating psychologist also testified for Parents.
8. The parties stipulated that if Student's guidance counselor, Ms. P, had been called to testify she would state "that at no time did she advise the Parents that [Student's] needs were not being met" and that "she had no recollection of Parents raising concern to her or at a meeting that Student may attempt to hurt herself." (N.T. 500).
9. The Hearing Officer admitted Exhibits SD-1 through SD-8 and P-1 through P-11. (N.T. 237, 555).
10. The School District objected to the admission of Exhibit P-4 or any reference to this document because it differed in content from the report from the same author of the same date submitted to the School District (Exhibit SD-6). School District Counsel pleaded surprise and prejudice that her rebuttal witness had not had the opportunity to study the version used by Parents. Exhibit P-4 had been produced by Parents but neither counsel had immediately recognized that the reports were different. The Hearing Officer overruled this objection and allowed cross-examination on the differences in the report. This ruling was made with the express understanding that the School District could not be held responsible for information not in its possession at the time of the preparation of the IEP at issue. (N.T. 501-506). The lack of availability of information at the time of the preparation of the IEP was also the basis of objection to information about the Private School contained in Exhibit P-6.

Evaluations of Student

11. The School District conducted a re-evaluation of Student in grade nine at the request of the Parents who had expressed concerns about her social and emotional adjustment in the school setting. In its November 21, 2002 Evaluation Report (ER), the School District administered to Student a Wechsler Intelligence Scale for Children-Third Edition (WISC-III) revealing a Full Scale I.Q. score of 99, a Verbal I.Q. of 95, and a Performance I.Q. of 103, decidedly in the average range. Using the Developmental Test of Visual-Motor Integration, Student showed borderline scores in visual-motor integration and average scores in visual perception. The Woodcock-Johnson III Test of Achievement showed scores in the below average through superior ranges. Student is below average in math calculation and applied problems, below average in writing samples, but above average in word identification and math fluency. She scored superior in story recall and broad reading. Using a Test of Written Language-3, with a quiet environment, Student demonstrated excellent listening recall skills. The Multidimensional Anxiety Scale for Children (MASC) revealed scores much above average in physical symptoms of the “intense/restless” and very much above average in “social anxiety” and “separation/panic.” On the Behavior Assessment System for Children (BASC), Parents reported clinically significant scores in anxiety, somatization, withdrawal, and attention problems. She is at risk in both leadership and social skills. The only disability category identified was “Other Health Impaired” and the identified educational needs included, among other things: opportunity to engage in learning in small, quiet settings; preferential seating to increase teacher proximity, contact and minimizing distractions; the chunking of materials; specially designed instruction in mathematics; and program modifications to reduce fatigue and anxiety, among other things. (SD-1, pp. 4-9).

12. This November 21, 2002 ER included the following statement:

[Student’s] program should include strategies and educational sessions to support the development of healthy coping skills to reduce stress and anxiety within the school setting and to foster the development of meaningful peer relations. [Student’s] profile suggests some degree of performance and separation anxiety that may decrease her perception of security within the school setting, resulting in frequent healthroom visits and guidance visits. Self evaluation of her anxiety level and the subsequent use of self-calming techniques would be appropriate following educational opportunities with [Student] to learn and practice relaxation techniques. [Student] should have an identified safe, quiet time-out area when she needs it, to regroup and relax when pressures build. A procedure for daily check-in points to support [Student] in proactive problem-solving and to monitor stress levels; thereby, affording an opportunity to plan for the day, might be helpful in reducing maladaptive avoidance behaviors. Supported testing situations with reduced time pressures and a quiet

setting would also be considered appropriate for reducing performance anxiety.

(SD-1, p. 9).

13. At the time of this evaluation, Student was fully mainstreamed in the regular education curriculum with the exception of receiving additional support for math in a resource room. An educational assistant was provided in Social Studies. (SD-1, pp. 3, 16).

14. Dr. S, a certified school psychologist with eleven years at the School District, administered the tests contained in the November 2002 ER. (N.T. 167, 172). At the time of this ER, Dr. S was aware of Student's treatment by Psychologist Dr. B, and pediatric neurologist Dr. H, as well as Student's sensitivity to sound. (N.T. 173).

15. The ER recommended an Occupational Therapy consultation (SD-1, p. 10) which was done on February 10, 2003. No Occupational Therapy was recommended at that time, but there was a referral for assistive technology. (SD-1, pp. 16-17; N.T. 192).

16. Dr. S conducted a classroom observation in which Student's on-task behavior was commensurate with other children in the 11-student classroom. (SD-1, p. 3; N.T. 174).

17. Student reported to Dr. S that certain sounds such as coughing or singing would cause her to feel anxious and physically tense. She reported having difficulty coping and the school psychologist stated that "there was some avoidance that was going on with those situations." (N.T. 184).

18. Dr. S was of the opinion that Student would operate best in a small, quiet setting with an opportunity to leave classrooms when the halls were quiet, opportunities to take breaks during the day, preferential seating and lots of prompting to minimize distractions, and services and accommodations to help reduce the stress level in the school setting and to develop Student's connections with other kids. (N.T. 189-191). The Hearing Officer accepts and adopts these opinions because they are consistent with the totality of the evidence and they are reasonably related to the observations and testing.

19. Dr. S had no formal contact with Student during the 10th grade year but prepared a re-evaluation in December 2004 when Student was in the middle of 11th grade. (N.T. 193-194; SD-5).

20. At that time, Dr. S had information from Dr. H, Dr. B, and Dr. B2. (SD-5, p. 2; N.T. 195-6). She observed Student in the chemistry class with 15 students. Dr. S observed the behaviors described by others such as pulling her sweatshirt over her head. Student also had on headphones, but was complying with instructions and on task. Teachers reported some difficulties with the completion of tests, a concern with attention and focus decreasing over time, as well as her sad and withdrawn appearance. (N.T. 196-197).

21. Dr. S described the Dr. B2 report as "complete and comprehensive." (N.T. 202).

22. Dr. B2 holds a Ph.D. in education and child development. She is in private practice evaluating children for learning and behavior problems. She saw Student at the request of Parents for assistance in planning post-high-school education. (N.T. 391-393; SD-2).

23. In her October 2004 report, Dr. B2 identified diagnoses of attention deficit disorder, anxiety disorder, hypersensitivity to sound, and Nonverbal Learning Disorder. Student's social skills are "poor" and she has trouble interacting with peers. Dr. B2 found "solidly developed skills in the verbal domain" but weaknesses in graphomotor output for complex rather than simple tasks, novel problem solving, math (with the exception of fluency) and some aspects of memory. Dr. B2 confirmed emotional and behavioral problems and a learning disability in math. (SD-2).

24. Dr. B2 also sent a letter to Parents suggesting ways of dealing with Student's problems with grooming and hygiene. (P-1, p. 19).

25. Dr. B2 recommended a psychiatric evaluation to explore reports from Parents that Student may harm herself, modifications to the school program to address the "collapse" at the end of the school day such as smaller class sizes, attention to the acoustic environment, a sensory integration based program to help tolerate sounds, and a program of relaxation training/meditation in school on a daily basis. (SD-2, p. 12).

26. Dr. B2 did not specifically recommend a speech and language evaluation or a central auditory processing evaluation. (N.T. 591).

27. An all-girls group is suggested to help Student improve her social skills, including the reading of social cues. She needs to understand gossip, joking, standing up for herself and resisting peer pressure. Dr. B2 stated that she would be concerned if "all the other people" were "kids whose problems were as severe as [Student's] or worse" and stated an opinion that "an all boys group would be undesirable because she is so socially immature." (SD-2, p. 13; N.T. 415, 422). The Hearing Officer accepts and adopts these recommendations because they are sensible, are based upon reasonable observation, and have come from a professional who has knowledge and experience in the field.

28. Dr. B is a licensed psychologist and a licensed counselor in Pennsylvania with a Ph.D. in counseling psychology who met with Student bi-weekly for individual psychotherapy for approximately two years from September, 2002 through August, 2004. Her private practice consists of approximately 60% children and adolescents and 40% adults. In a November 2004 letter to the School District, Dr. B recommended for Student a smaller, more limited environment to reduce stress levels, an increase of one-on-one attention, and a self-contained classroom. (SD-3; N.T. 342-345; 350).

29. Dr. B saw Student again in July 2005 and approximately 10 times through November, 2005. (N.T. 344-345). Student returned to Dr. B in July, 2005 to address her lack of

interaction with others. She was spending an inordinate amount of time in her room and on the computer. (N.T. 351).

30. Student reported to Dr. B that she experienced a lot of frustration from the sounds at school as well as the size of the school. She would have a difficult time focusing. (N.T. 347-348).

31. Dr. B did not believe Student was learning naturally through interaction with peers at school and she testified that she was working on coping suggestions and role play to minimize Student's anxiety. (N.T. 348-350).

32. Dr. H has been Student's physician since she was nine years old. She is a board certified neurodevelopmental pediatric specialist with particular interest in premature babies. She has a medical degree from the University of Pennsylvania and has approximately 30 years of experience in neurology, pediatrics, and developmental pediatrics. (SD-4, p. 2, N.T. 359-361).

33. On December 10, 2004, Dr. H prepared a written report stating that the "current educational setting is extremely stressful to [Student], causing poor progress, emotional meltdowns and further social withdraw [sic]." She recommended small class size in a quiet self-contained environment and stated that Student's "social skills need to be addressed with formal intervention in school if she is to be successful and independent in the world." (SD-4, p. 2; N.T. 363-365).

34. At hearing, Dr. H testified that over the past two years she has been concerned about Student's increasing anxiety, social withdrawal, and social immaturity. Compounding these problems was the auditory hypersensitivity which made her anxiety "extreme." (N.T. 367-368).

35. Dr. H described Student in or about December 2004 as having almost no eye contact, unkempt, hiding in her sweatshirt, turning the chair away from doctor, and giving tangential, inappropriate, anxious, and very immature responses. (N.T. 370-371). She recommended that the problems with Student's social skills be addressed formally in an IEP. (N.T. 373).

36. Dr. H saw Student in August 2005, after Student had been at the Private School for several months. Student was at that time dressed appropriately, she spoke at a normal speed, answered questions appropriately, and was able to stay on task. This difference could not be explained by any change in medication. (N.T. 374-375).

37. The doctor testified that Student had made "a number of statements in the past that might be construed as self-injurious." (N.T. 380).

38. Ms. S conducted an occupational therapy evaluation on January 10, 2005. Utilizing three assessments, Ms. S found "significant sensitivities to auditory, visual, and vestibular input." Student also has hypersensitivities to bright lights, is fearful of heights

(although she loves roller coasters) and a sensitivity to certain fabrics, particularly clothing tags. (SD-6, p. 2). Ms. S recommended the TOMATIS Program to address listening process deficits and sensory sensitivities as well as the limitation of visual and auditory distractions. TOMATIS is an intensive program of sound stimulation, audio-vocal work, and counseling to develop listening and listening-related skills. (SD-6, p. 4).

IEP's

39. The IEP team met October 1, 2004 and recommended further evaluation. (SD-5).
40. The ER dated December 15, 2004, prepared by school psychologist Dr. S, added "Specific Learning Disability" as a secondary disability category. (SD-5, p. 12).
41. During the first marking period of the eleventh grade, Student had the following report card: Math Resource Room: C-; Chemistry in the Community: C-; Brit Lit-B: C; Study Skills-Resource Room: B+. (SD-5, pp. 3-4).
42. The British Literature teacher reported that Student "frequently appears sad or withdrawn" but the Chemistry teacher stated that she "interacted well with her lab partner." (SD-5, p. 4).
43. Parents reported that one of Student's frequent coping mechanisms is to "hide" in the hood of her sweatshirt. (N.T. 262-263).
44. Father testified that Student cannot go to a store, make a purchase, and know that she has the correct change. (N.T. 494).
45. Ms. B is the Learning Support teacher at the School District's high school. Student was in her Resource Room math class in spring 2004 in tenth grade, and Ms. B taught her study skills in two marking periods in the eleventh grade. (N.T. 143-147). Ms. B confirmed that for the most part Student would have her hood up at school. (N.T. 482).
46. The Hearing Officer finds that in order to cope with discomfort, Student will pull the hood of her sweatshirt over her head and use earphones to listen to music. As her level of discomfort increases, she becomes physically restless and is concerned that she might have a panic attack. (SD-5, p. 9; N.T. 262-263, 482).
47. Based upon all of the testimony and documentary evidence, the Hearing Officer finds that Student would be less anxious, less tired at the end of the day, and perform better on a more consistent basis if she had a quieter environment at school. (*See* SD-5, p. 10; Testimony of Dr. B2).
48. The IEP team met June 13, 2005 to discuss the 2005-2006 placement. The IEP which resulted (including some later handwritten additions) provided for goals and objective in

mathematics, a goal of increasing appropriate social behaviors in all instructional settings, and increasing the ability to “identify, select, and use age-appropriate coping strategies to manage and reduce levels of daily stress and anxiety within the learning environment.” (SD-7, pp. 5-7). Also included was a goal of improving “pragmatic/social communication skills by improving her initiation of communication in school.” (SD-7, p. 9). The IEP included a behavior plan. (SD-7, p. 8).

49. The IEP proposed a placement of emotional support/learning support including a resource room. The percentage of time outside of a regular classroom would be 21 to 60%. The IEP provided for transition planning into a two-year post secondary education. (SD-7, pp. 14-17).

50. School Principal, Mr. B, described the communication skills goal as including proposed weekly placement in a speech and language class with a therapist and two other male students, both with Asperger’s, one in tenth grade and one in eleventh grade. Mother did not approve of this placement with two males. (N.T. 91-92; 329-330).

51. On June 27, 2005, the School District sent to Parents a revised IEP and a Notice of Recommended Educational Placement (NOREP) calling for a combination of emotional support, learning support, and regular education. (SD-7, pp. 24-25).

52. Parents did not approve the proposed program. (N.T. 118, 163-164).

Private School

53. At hearing, Parents presented a letter from the Coordinator of Special Education at the Private School dated July 5, 2005. According to the letter, Student has been enrolled since March 30, 2005. At first, Student received direct instruction within the teaching setting but was sent to an isolation area to complete independent work. Because of monitoring issues, she was sent to the Special Education Conference Room which is described as a more serene environment. The Private School continues to recognize a need for a quiet environment with only one or two other students. Student is struggling with math and needs one-on-one attention in this subject. The course objectives contained in this report are thoughtful, comprehensive, and uniquely designed for Student, including a practical Health class. (P-6).

54. Parents presented a written observation of Student at the Private School dated October 25, 2005. Dr. B2 observed Student for approximately three hours including observation in an English class (where there is usually one classmate, but because of an absence Student received individual tutoring) and in music class. Student also received individual tutoring in math class. She did not eat but played chess at lunchtime with one other girl and interacted appropriately with her. The school is in a suburban office complex with many small rooms and individual carrels. It has an on-site massage therapist. Student self-reported that she was “happier, safer, more secure, and less anxious (in comparison with public school).” (P-10, p. 2).

55. Initially there was a problem with Student's excessive use of the computer to avoid social interaction. This resulted in a [behavior] incident when computer time was restricted. A behavior plan was developed including time with an addictions counselor, use of yoga, chair massage, and group counseling. Private psychotherapy has resumed. (P-10, p. 2).

56. Dr. B2 also observed the proposed School District placement, accompanied by the School District's psychologist, on November 3, 2005. She viewed and observed the contemporary world history class with 15 students, a teacher, and an aide. She met with the special education classroom teacher, Mr. D, and observed the carpeted classroom with two male students. (P-10, pp. 3-4).

57. The School District attempted to gather information from the Private School by soliciting input on a questionnaire (SD-8), but no response was received. (N.T. 222).

58. Parents intend to keep Student in the Private School for an extra year. Although she would be eligible to graduate in June 2006, the expectation is that she would need another year to prepare her for post-high school studies. (N.T. 338).

59. The Private School is accredited and serves a majority of students with either therapeutic needs or learning disabilities, but does not service only special education students. (N.T. 223-224).

60. The Private School offers a program appropriate for Student.

61. There are no equitable considerations which would weigh against or reduce tuition reimbursement.

CONCLUSIONS OF LAW

1. Student's IEP for the 2005-2006 school year failed to satisfy the legal requirements of the IDEA statute and regulations.

2. As a matter of law, the Private School is appropriate.

3. Parents are entitled to reimbursement for tuition (and other reasonable fees) and transportation to the Private School for the 2005-2006 school year.

4. Parents are entitled to reimbursement for the actual costs of the psychological evaluation by Dr. B2 dated October, 2004 but no other expert witness fees.

DISCUSSION OF ISSUES

1. Did the School District provide Student with a free appropriate public education (FAPE) based upon the June 2005 Individualized Education Program (IEP), as revised?

The educational standard to which the School District's action must be compared is established by our state and federal courts. The IDEA does not require states to develop IEPs that "maximize the potential of handicapped children" but merely requires the provision of "some" educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982).

The Third Circuit has defined the standard to mean that more than "trivial" or "de minimus" benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179, 184 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Moreover, the Third Circuit has determined that a student's demonstrated progress in an educational program is sufficient to show that a school district's IEP provides meaningful benefit necessary to satisfy the IDEA's FAPE standard. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). The issue, then, is whether or not the School District has shown that it provided a meaningful benefit to this Student, gauged in terms of demonstrated progress within the educational program.

The IEP for each child with a disability must include certain information which is spelled out by federal regulation, including a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives; a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the

annual goals; and an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. 34 CFR §300.347(a)(1) through (7).

Yet, it is not enough to contain these seven required sections. Demonstrated progress within the educational program cannot be made in a setting where Student retreats into her sweatshirt rather than associate with peers, “collapses” at the end of the school day, and is constantly anxious and distracted.

This is admittedly a close case. The Hearing Officer is convinced that the School District has performed acceptable evaluations and that the team has done its very best to describe a program which would address Student’s needs within the constraints of a public school setting. On the other hand, Parents testified quite credibly that their daughter became increasingly anxious about her attendance in the public school setting. They obviously desire the best for their daughter and they observed a failure of the School District to assist their child in coping with ordinary life such as making change after purchase or understanding basic mathematics concepts. (*See, e.g.,* N.T. 494).

This Hearing Officer is aware that the law does not require a perfect program and that Student may have been making some meaningful educational progress in the academic areas, with the exception of math. The School District has done what it could to accommodate Student’s extraordinarily complicated needs. However, utilizing the record as a whole, the Hearing Officer agrees with Parents that the specially designed instruction for the 2005-2006 school year is essentially the same as for the last three years. (Compare SD-7 with P-7, P-8, and P-9). The real problem is that despite the School District’s best intentions, the placement has not addressed Student’s declining grades and alarming anxiety-induced behaviors, including some self-harm.

Since the November 2002 evaluation, the School District has recognized that this Student has problems with stress and anxiety within the school setting and fostering the development of meaningful peer relations. It is in these areas that the School District appears incapable of providing an appropriate program. The hustle and bustle of a public high school is not the environment for someone with extreme auditory sensitivities. However, isolating Student in an emotional support classroom is also not the answer. Placing Student in a class with two males with Asperger's simply does not appear to be appropriate because it further compounds the peer relationship problems. The Hearing Officer agrees that Student needs opportunities to observe and relate closely to female peers. Although the School District is trying to put together various components of its existing programs, on this record, these combinations simply cannot meet all of Student's academic, emotional, or social needs.

The Hearing Officer agrees that the focus must be on what was known by the School District at the time that it wrote and revised the IEP in question. However, it had sufficient information about the emotional status of Student based solely upon the testimony of the School District witnesses. Similarly, Parents had to focus on the program offered them, not the additional information provided at hearing about a learning lab, transition workshops, or a work program at the YMCA. I will not hold the School District responsible for the report of Ms. S dated January 10, 2005 (P-4) or the discrepancy between her two reports. (*See* N.T. 501-506). Nevertheless, the School District was well aware of the fundamental problem of hypersensitivity to sound.

Sometimes the square peg cannot fit into the round hole. This case represents one of those situations. The School District is doing its best, but its program simply is not appropriate for Student. Usually the Hearing Officer would not be persuaded by evidence of improvements

(socially and academically) in the Private School because those improvements may not necessarily result from the new educational placement; the cause and effect cannot be established with certainty. Yet, the fairly consistent picture of Student while in the public school setting is of withdrawal into her hooded sweatshirt, complete fatigue which can be attributed to her hypersensitivities, a lack of significant progress in rudimentary math, poor grades, and a dreadfully unhappy child. This is contrasted with the picture of Student in Private School who is enjoying yoga, interacting with her peers in a music class, playing chess with a female classmate, and improving in her appearance and personal hygiene. This change is simply too marked to be ignored.

The Hearing Officer must conclude that the June, 2005 IEP is not appropriate because it cannot meet all of Student's social, emotional, and academic needs.

2. If the IEP was not appropriate, is Student entitled to reimbursement for tuition, transportation, and other expenses at the Private School?

An exceptional student is entitled to tuition reimbursement when (a) FAPE is denied, (b) the parent properly seeks privately secured placement, and (c) the balancing of the equities lies in the parents' favor. *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993), and *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 105 S.Ct. 1996 (1985); 34 CFR §300.403. The Hearing Officer will engage in this three-step *Burlington-Carter* tuition reimbursement analysis.

Did the School District offer an appropriate program?

As described in the preceding section, the Hearing Officer believes that the School

District has not offered an appropriate program. The IEP (SD-7) contains objectives/benchmarks designed to address some of the Student's needs, but the totality of the program cannot accommodate Student's many complicated social and emotional needs. It may be basically acceptable from an academic standpoint, but the IEP as proposed cannot be deemed "appropriate" because it does not provide meaningful educational benefit to a child who needs a setting other than, for example, an isolated grouping with two autistic male students.

Is Student's current placement appropriate?

Parents' choice for private school need not satisfy the IDEA requirements in order to qualify for reimbursement. The standard is whether the placement was "reasonably calculated" to provide Student with educational benefit. *In Re: M.K.*, Special Education Opinion No. 1445 (2004).

The Hearing Officer has no doubt that placement at the Private School would be "reasonably calculated" to provide Student with educational benefit. The Private School is accredited and offers a small school environment devoted to students with learning disabilities but not limited to such students. Further, the Private School can, and apparently does, offer a program designed to address Student's unique disabilities. The intensely personal interaction between Student and teachers appears to be extremely beneficial to Student and provides the emotional support lacking in the public school setting. The Private School may indeed have parts of the school that are noisier than the public school, but the Private School has the ability to provide the kind of atmosphere that caters to Student's hypersensitivity to sound. Consequently, the Private School is determined to be appropriate.

Do the equities favor reimbursement?

The Hearing Officer heard nothing that would suggest anything other than a good faith effort on the part of the Parents. Both parents love this child and act in the best interest of their child. They have worked with the School District to provide an environment which is less stressful and more satisfying to Student. They seem focused on providing a practical education which will allow their child to be successful in life and able to cope with the stresses of the world outside the home despite her many disabilities. They are understandably worried that Student became increasingly anxious, fatigued, and emotionally distraught while in the School District's high school. They provided reasonable notice to the School District that they were dissatisfied with the offered placement and intended to enroll Student in private school.

The Federal Regulations, at 34 CFR §300.403(d), contain limitations on reimbursement for private school costs for failure to inform the IEP team of parental rejection of the placement proposal or failure to give at least 10-business-day notice prior to the removal of the child. None of these limitations were raised by School District as defenses in this case. The Hearing Officer finds that there are no equitable considerations which would weigh against or reduce tuition reimbursement.

3. Is Student entitled to expert witness fees?

The grounds for awarding reimbursement from public funds for an independent educational evaluation (IEE) are found in 34 CFR §300.502. That rule establishes a precondition of parental disagreement with the District's evaluation. 34 CFR §300.502(b). Applying this test it seems appropriate to award the costs of the psychological evaluation performed by Dr. B2

dated October, 2004 which was requested by Parents and which was utilized by the School District.

Despite a specific request to do so, Parents' counsel has provided no legal basis for awarding the costs of this case and has proposed no order awarding these costs. Consequently, the Hearing Officer will decline to do so.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. The School District shall pay tuition (including reasonable fees associated with attendance) and transportation reimbursement for the Private School from September 2005 through the end of the current school year. School District may provide transportation for the balance of the school year in lieu of paying transportation costs.
2. The School District shall reimburse Parents for the actual costs of the psychological evaluation by Dr. B2 dated October, 2004 but no other expert witness fees.

Date: January 7, 2006

Debra K. Wallet, Esq.
Hearing Officer
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