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Pennsylvania  
Special Education Hearing Officer

DECISION

Child's Name: LH

Date of Birth: XX-XX-XXXX

Dates of Hearing:  
November 16, 2009  
November 17, 2009  
December 7, 2009  
December 8, 2009  
January 4, 2010

**CLOSED HEARING**

ODR Case # 00265-09-10-AS

Parties to the Hearing:

Mr. & Mrs.

Ms. Joanne Wells  
Montour School District  
223 Clever Road  
McKees Rocks, PA 15136

Representative:

Pamela Berger, Esquire  
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Pittsburgh, PA 15211

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Date Record Closed: January 18, 2010  
Date of Decision: February 2, 2010  
Hearing Officer: Jake McElligott, Esquire

### **INTRODUCTION AND PROCEDURAL HISTORY**

“Student” (“student”) is a 13-year old student residing in the Montour School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>. Parents filed a complaint in September 2009, alleging that the District’s evaluation of the student and the individualized education plan (“IEP”) proposed by the District for the 2009-2010 school year are both inappropriate. Parents requested tuition reimbursement for a unilateral private placement made by the parents for the 2009-2010 school year. The District counters that the evaluation report (“ER”) is appropriate, given the information that was provided about the student and its testing of the student, and the IEP was appropriately designed based on that information. For the reasons set forth below, the parents will prevail on their tuition reimbursement claim, but certain factors support an award of less than 100% of the private placement tuition. The District will also be ordered to undertake a re-evaluation.

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<sup>1</sup> 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.

## **ISSUE**

Is tuition reimbursement owed to the parents for the student's private placement in the 2009-2010 school year?

## **FINDINGS OF FACT**

1. The student has been identified, under federal and Pennsylvania special education laws<sup>2</sup>, as a student with a disability. The student has been identified as a student with autism and specific learning disabilities. (Joint Exhibit ["J"]-1; Parents' Exhibit ["P"]-2; Notes of Testimony ["NT"] at 38).
2. The student has also been diagnosed with obsessive compulsive disorder and generalized anxiety disorder. (J-2; NT at 38).
3. From kindergarten (the 2002-2003 school year) through 3<sup>rd</sup> grade (the 2005-2006 school year), the student attended a private school. The student received various levels of support both in school and out of school but functioned relatively successfully in the school environment. (P-5; NT at 191-192).
4. In approximately November 2006, in 4<sup>th</sup> grade (the 2006-2007 school year), the student's behavior escalated at the private school and led to a request by the school that the student no longer attend. The student exhibited tantrums, yelling, and screaming. The student was verbally and physically aggressive toward fellow students and staff, including knocking objects over, throwing objects, and flipping desks. (NT at 191-192, 373-374).
5. The student was homeschooled from November 2006 through the end of the 2006-2007 school year. The student continued to be homeschooled for the 5<sup>th</sup> and 6<sup>th</sup> grades (the 2007-2008 and 2008-2009 school years). (J-1 at page 2; 191-192).
6. The parents decided to end the homeschooling experience in the spring of 2009 due to the student's behavior at home. The student was tantruming, was being physically violent with siblings and verbally aggressive with parents. Often, the student was removed

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<sup>2</sup> Id.; 22 PA Code §§14.101-14.162.

from the home to spend time with the father at his place of work. (NT at 360-361, 363).

7. In March 2009, the student's pediatrician, an expert in emotional disturbance in children and developmental pediatrics, contacted the District about special education programming and the need for the student to transition to a specialized private placement. (P-1; NT at 33-37, 419).
8. In May 2009, the parents contacted the District about public school services for the 2009-2010 school year. The discussion with district administration included details of the student's behaviors. (NT at 362-363, 419-424, 518-519).
9. The student manifests behaviors that are likely attributable to autism, such as certain repetitive hand movements, sensitivity to sound, and the need for deep pressure (often met by posturing/laying across pieces of furniture). The student also exhibits behaviors that are likely manifestations of obsessive compulsive disorder. These behaviors include babbling to himself, babbling or speaking nonsensically, voicing strange or disturbing thoughts, and the multiple repetitions/recycling of words, sentences, and paragraphs when reading. The student often walks in an exaggerated manner, taking large steps and precise routes between points, such that it often takes the student many minutes to cross a short distance. Additionally, the student engages in rapid, loud, extensive, ritualistic repetitions of the sound "inse", such as "inse, inse, inse, inse", etc. The student will repeat "inse" for up to 2,000 times for what the student perceives to be a ritualistic transgression, such as swallowing or the sense that the student has committed an error or the student's perception that the incantation wards off troubling scenarios. (NT at 42, 56-57, 73-74, 200, 204, 357, 368-373).
10. The student also has significant sensory issues with sound and touch, as well as extreme difficulties with transitions, which often involve elaborate rituals. In the current placement, the student has exhibited behavior which is potentially harmful to the student or to others. (NT at 72-76).
11. On May 21, 2009, the District sought permission to evaluate the student. The parents granted permission on May, 26, 2009. (J-4).
12. On July 10, 2009, the parents contacted the District by letter voicing concerns about the fact that the student had not yet

been evaluated. The letter also discussed multiple aspects of the student's diagnostic and educational background and the fact that the parents and the District were discussing private placements for the student. (P-5; S-4).

13. On July 21, 2009, the student was evaluated by a school psychologist under contract with the District. (J-1; NT at 254).
14. The student did not present with problematic behaviors at the testing session on July 21<sup>st</sup>. The student's father testified that the student had been deeply prepared to behave appropriately so that the testing could take place. The father also testified that the student related to him afterwards that the student was engaging in silent "inse" behavior by counting with toe wiggles the number of times he internally counted "inse". The school psychologist testified that the student was engaged and conversational when topics of intense interest to the student (Webkinz and Club Penguin online game environments) were used to build rapport. (NT at 287-290, 303-304, 322-324, 366-369).
15. On August 3, 2009, the parents wrote a letter to the school psychologist which they sent to the District high school. The letter was subsequently amended on August 5, 2009, and the amended version was hand-delivered to the school psychologist at a meeting on August 6, 2009. (P-6; NT at 386).
16. On August 6, 2009, the school psychologist spoke briefly by telephone with the student's developmental pediatrician. The school psychologist's understandings of that conversation were ultimately included in the District's ER. The contents of the ER related to the developmental pediatrician's insights included various diagnoses, the fact that the student obsessive compulsive disorder related in "negative effect on (the student's) overall functioning" and that the student is "deceptively impaired". (NT at 265, 384-386, J-1 at page 6).
17. On August 6, 2009, the school psychologist met with both parents to discuss the student. The parents delivered the amended letter of August 5, 2009. (FF 15). The parents also brought three large binders of information for the school psychologist to review. (P-6).
18. On August 6, 2009, attorney for the parents sent a letter to the District informing the District that, absent an agreed-upon IEP, the parents would look to the District to fund a private placement. (S-6).

19. On August 18, 2009, the District issued its ER. (J-1).
20. The ER identified the student as a student with autism and specific learning disabilities in reading and written expression. (J-1 at page 15).
21. The ER included information from various sources and reports as far back as 1998. (J-1 at pages 3-7).
22. The ER included observational data from the parents and the school psychologist as well as behavioral rating data from the parents and a teacher at the summer program where the student attended in summer 2009. (J-1 at pages 7-8, 11-13).
23. The ER also contained cognitive and achievement assessment scores both from the past and as ascertained by the District's school psychologist. (J-1 at pages 8-10).
24. The school psychologist testified that the student did not meet the criteria for identification as a student with an emotional disturbance, although that identification might potentially be appropriate based on information obtained during the course of these proceedings. The school psychologist further testified that she did not consider an identification as a student with an other health impairment. (NT at 342-346).
25. The school psychologist testified that the student described in these proceedings was not the student she had heard about, read about and met in the period of July and August 2009. (NT at 345).
26. On August 31, 2009, the student began attending a private placement at parents' expense for the 2009-2010 school year. (NT at 244).
27. The private placement provides intensive academic and behavioral support. The student is one of two students in an autism support classroom with one teacher and one classroom aide. A full-time autism behavioral support professional is on site and works daily with students and staff in the autism support classes. (NT at 62-73, 368-369).
28. The private placement has developed individualized behavioral interventions for the student. The private placement has developed individualized instruction for the student. The private

placement has not developed individualized academic programming for the student; the student's academic programming is the regular education curriculum for the school district where the private placement is located. Additionally, the private placement is not providing therapeutic services to the student. None of the private placement's behavioral or instructional interventions are part of a document outlining the student's programming at the private placement. (NT at 66-67; 79-87; 113-122, 378-391).

29. On September 2, 2009, the parties met for an IEP meeting. The IEP contained goals in writing, reading, speech and language, social skills, behavior, and organizational skills. (J-2 at pages 11-20).
30. The IEP calls for a variety of common types of specially designed instruction, as well as 30 minutes of emotional support per week and 30 minutes of speech and language support per week. (J-2 at pages 22-23).
31. The IEP calls for the student to receive math, reading, and English instruction in an emotional support setting. The remainder of the student's program would be delivered in the general education curriculum. The student would be in a special education setting approximately 70% of the school day with the remainder of the school day in regular education. (J-1 at pages 25-26).
32. On September 9, 2009, the parents rejected the District's IEP and recommended placement. (J-3).
33. Parents filed their complaint on September 11, 2009.
34. The student's developmental pediatrician issued a report on November 9, 2009. (P-2).

### **DISCUSSION AND CONCLUSIONS OF LAW**

Again, the parents have claimed that they are entitled to tuition reimbursement for the private placement in the 2009-2010 school year. The District counters that the ER is appropriate, given the information that was provided about the student and its testing of the student, and

the IEP was appropriately designed based on that information. Both the parents' and the District's arguments can be addressed through an analysis of the parents' claim for tuition reimbursement.

### Tuition Reimbursement

Parents claim tuition reimbursement for the cost of the private placement for the 2009-2010 school year. Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability.<sup>3</sup> A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated in IDEIA.<sup>4</sup>

In this three-step analysis, the first step is an examination of the school district's proposed program. Here, the District's proposed program is not appropriate to meet the student's needs. (FF 29, 20, 31). What is most clear from this record is that the District evaluated and prepared a program for a student that presented very differently from the student characterized by the record in these proceedings. (FF 4, 6, 9, 10, 20, 21, 22, 23, 24, 25). The District asserts that this is the crux of its argument—it evaluated and programmed appropriately and that, after

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<sup>3</sup> 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi); Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985).

<sup>4</sup> 34 C.F.R. §§300.148(a),(c),(d)(3).

the fact, the student emerged as a student requiring, perhaps, very different programming.

First, as to the actions of the District, there appears to be enough evidence in the record that the District was apprised of the student's needs, and particularly the needs associated with obsessive compulsivity, to know that the student's identification mosaic might include an identification of emotional disturbance, or at least account for the obsessive compulsive behaviors in the educational setting. (FF 12, 15, 16, 17, 21, 22). The District's response, in sum, is "we didn't know the behaviors were that serious". The weight of the record, taken in its entirety, would show that the District had multiple, detailed expressions of the student's behavior (whether attributable to autism or to obsessive compulsivity) to lead it to accurately identify the student's needs and design an appropriate program.

Second, the corollary argument by the District is that the parents withheld, or selectively shaped, information provided to the District. As to the actions of the parents, it is not their job to impress upon a school district the severity of a student's needs. Parents must cooperate in the assessment process and give over to the school district all information, both by report and in writing, that might be useful in identifying and programming for the student. In this case, the parents did exactly that, providing information early on that the student had significant needs, needs that might necessitate a private placement. (FF 7, 8, 12). Those

needs were bolstered with data through the evaluation process. (FF 15, 16, 17, 21, 22). Granted, the school psychologist's direct observations of the student did not reveal problematic behavior. (FF 14). But it is the explicit finding of this hearing officer that the parents did not act in bad faith in their communications with the District or in their participation in the evaluation process.

Quite simply, the evidence taken in its entirety supports the finding that the District's proposed IEP is not appropriate. (FF 29, 30, 31). The proposed IEP is not reasonably calculated to yield meaningful education benefit based on the information that the District had as the result of its evaluation process in July and August 2009. (FF 14, 15, 16, 17, 20, 21, 22, 23, 29, 30, 31).

When the school district's program is found to be inappropriate, as here, the second step of the tuition reimbursement analysis is an examination of the appropriateness of the private school program which the parents have selected. Here, the private placement is appropriate. The student's program includes academic instruction, individualized instructional strategies, and intensive behavioral intervention. (FF 27, 28). Taken in its entirety, the weight of the record clearly supports that the private placement is appropriate for the student. There are, however, troubling aspects to the program, particularly the fact that the student has no individualized academic instruction and no therapeutic component. (FF 28). Again, the entirety of the record supports the finding

that it is an appropriate placement for the student, and these flaws are not enough to counteract that finding. But these flaws are not minor and do play a role in the analysis, as outlined below.

When the school district's program is found to be inappropriate, as here, and the private placement is found to be appropriate, as here, the third step of the analysis is to determine if tuition reimbursement is a fair remedy and, if so, in what amount. This is the so-called "balancing of the equities" step. In this case, the flaws in the private placement's programming must be accounted for. The student presents a complex mosaic of diagnoses and needs. (FF 1, 2, 9, 10). The private placement is working appropriately within that mosaic. But to do so with a generalized adoption of academic curriculum, without any written documentation of programming or behavioral intervention, and without any therapeutic involvement is, as indicated, flawed. (FF 28). In sum, the parents may have appropriately rejected the District's proposed program and may have selected, on the whole, an appropriate private placement. But that placement has significant flaws. For that reason, the award of compensatory education will be reduced.

Accordingly, the parents are entitled to tuition reimbursement for the private placement for the 2009-2010 school year. The award of tuition reimbursement will be reduced, however, to reflect the balance of the equities between the parties.

### Re-Evaluation

While not presented as an explicit issue at the hearing, there is a need for the student to be re-evaluated. The parties do not dispute the identification of the student in the ER. But, based on the record in these proceedings, it appears that there is a lingering question of whether the student should be identified as a student with an emotional disturbance under 34 C.F.R. §300.8(c)(4). (FF 20, 24, 25). To address this uncertainty, the order will speak to a re-evaluation process for the student.

### **CONCLUSION**

The District's proposed IEP and educational placement for the 2009-2010 school year are inappropriate. The parents are entitled to an award of tuition reimbursement for the private placement for the 2009-2010 school year, although this award will be reduced as a result of the balance of the equities between the parties.

Additionally, the District must undertake a re-evaluation of the student to determine if the student should be identified as having an emotional disturbance under the terms of 34 C.F.R. §300.8(c)(4).

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, within 45 calendar days of the date of this order, the District is ordered to pay directly to the private school 75% of the private placement's tuition charge for the 2009-2010 school year for the tuition account for the student. After the payment is made to the private placement, it is the responsibility of the parents and the private placement to reconcile between themselves any surplus or deficit in the tuition account for the student for the 2009-2010 school year.

Additionally, parents are also entitled to reimbursement for mileage for transportation to the private placement, using mileage reimbursement as allowable under Internal Revenue Service mileage rates for the period(s) in question. The mileage reimbursement is limited to one round trip, for every school day the student attended/attends in the 2009-2010 school year, from the parents' address to the address of the school as calculated using an online mapping or directions service. The reimbursement for mileage/payment schedule shall be arranged between the parties.

Finally, the parents shall cooperate with the District to facilitate a re-evaluation of the student to determine specifically if the student's

obsessive compulsive disorder and/or generalized anxiety disorder and/or any other relevant diagnosis supports an identification of the student as having an emotional disturbance under 34 C.F.R.

§300.8(c)(4). The District shall issue the requisite permission to re-evaluate form no later than 10 calendar days after the date of this decision.

Jake McElligott, Esquire

Jake McElligott, Esquire  
Special Education Hearing Officer

February 2, 2010