

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: M. H.

Date of Birth: [redacted]

Dates of Hearing:

August 7, 2014  
September 26, 2014  
September 29, 2014  
October 3, 2014

### **CLOSED HEARING**

ODR Case # 15199-1415AS

Parties to the Hearing:

Parent[s]

Methacton School District  
1001 Kriebel Mill Road  
Norristown, PA 19403

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Mark Voigt, Esquire  
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November 10, 2014

November 25, 2014

Jake McElligott, Esquire

## **INTRODUCTION**

Student is a [teen age] student residing in the Methacton School District (“District”). The parties do not dispute whether the student qualifies as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)<sup>1</sup>. Parent claims that the District owes the parent tuition reimbursement for a unilateral private placement undertaken for the 2014-2015 school year because the District’s proposed program and placement was not designed to provide a free appropriate public education (“FAPE”) to the student.

The District counters that its program and placement proposed for the 2014-2015 school year are reasonably calculated to provide FAPE to the student and, as such, parent is not entitled to tuition reimbursement or compensatory education for alleged violations of IDEA.

For the reasons set forth below, I find in favor of the parent.

## **ISSUES**

Is the parent entitled to tuition reimbursement  
for the unilateral private placement  
undertaken for the 2014-2015 school year?

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<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.162 wherein Pennsylvania education regulations explicitly adopt most provisions of 34 C.F.R. §§300.1-300.818.

## **FINDINGS OF FACT**

1. In 2004, the student was internationally adopted at [an early elementary school age]. (Parent's Exhibit ["P"]-1; NT at 56-57).
2. In December 2006, the student was initially identified by the District as a student with a disability, namely specific learning disabilities in reading, mathematics, and written expression, and a speech/language impairment. (P-10 at pages 1-2).
3. The December 2006 evaluation report ("ER") determined, through cognitive testing, that the student's full-scale IQ was 83, in the low-average range. On the instrument's four indexes, the student's scores were 80 (working memory), 85 (processing speed), 87 (verbal comprehension), and 92 (perceptual reasoning). On a measure of nonverbal intelligence, the student's nonverbal IQ was 102, in the average range. (P-10 at page 2).
4. In the December 2006 ER, the student's achievement scores in reading, mathematics, and written expression were all markedly low. (P-10 at page 2).
5. In November 2009, the student was re-evaluated by the District. The student's cognitive testing, and achievement results, were relatively consistent with the results obtained in the December 2006 ER. (P-10 at page 2).

6. The November 2009 re-evaluation report (“RR”) continued to identify the student as a student with specific learning disabilities and speech/language impairment. (P-10 at page 2).
7. In February 2012, the student underwent an independent educational evaluation (“IEE”). (P-1).
8. In the February 2012 IEE report, by observation, the independent evaluator noted that the student had significant issues related to language. Her cognitive testing yielded a full-scale IQ of 72, in the borderline range. Index scores, except for working memory, were largely consistent with prior cognitive results: 77 (verbal comprehension), 82 (processing speed), and 86 (perceptual reasoning). Working memory (56) was markedly lower. (P-1 at page 11).
9. The February 2012 IEE found that, accounting for the lower working memory in calculating the student’s general ability index (“GAI”), the student’s GAI score was 81. (P-1 at page 11).
10. On a measure of nonverbal intelligence, the February 2012 IEE found the student’s nonverbal IQ was 84, in the low-average range. (P-1 at page 12).
11. The February 2012 IEE found, through assessment of attention and behavior, that the student self-rated, and was rated both by parent and a teacher, as having multiple at-risk or clinically significant scores. (P-1 at pages 23-24).

12. The February 2012 IEE continued to identify the student as a student with specific learning disabilities and speech/language impairment. The IEE also recommended an identification of the student as having the health impairment of attention deficit hyperactivity disorder (“ADHD”). (P-1 at page 25).
13. In April 2012, the District issued a RR which incorporated the results of the February 2012 IEE. Using much of the data from the IEE, the April 2012 RR similarly identified the student as a student with specific learning disabilities, speech/language impairment, and ADHD. (P-10).
14. Over the spring, summer, and fall of 2012, the parties disputed the student’s educational programming. Ultimately, in October 2012, the parties reached a settlement of that dispute through a written settlement agreement. (P-15).
15. The October 2012 settlement agreement settled all claims between the parties “from the beginning of time” through the end of the 2013-2014 school year (including any programming that might be provided in the summer of 2014). (P-15).
16. In its relevant parts, the October 2012 settlement agreement provided that the District would provide tuition for the student at a

private placement (Private School) for the 2012-2013 and 2013-2014 school years, among other services. (P-15).<sup>2</sup>

17. The October 2012 settlement agreement provided that, in the spring of 2014, the student would undergo a District re-evaluation process in which parent would cooperate and provide requested permissions, consents, and/or input. (P-15).
18. In the spring of 2014, pursuant to the relevant provisions of the October 2012 settlement agreement, the District undertook its re-evaluation process. (NT at 317, 456).
19. In April 2014, the District issued an RR. Through cognitive testing, the student's full-scale IQ was scored at 73, in the borderline range. On the instrument's four indexes, the student's scores were 65 (working memory), 69 (verbal comprehension), 84 (perceptual reasoning), and 100 (processing speed). The re-evaluation process did not include separate nonverbal intelligence testing. (School District Exhibit ["S"]-3 at pages 6-9).
20. The achievement and speech/language assessments in the April 2014 RR were consistent with prior testing. (S-3 at pages 9-12, 15-21).

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<sup>2</sup> At this point in the chronology, a specific point must be addressed. In February 2013, parent asserts that a District special education administrator made a presentation to the District's school board related to budgetary matters for out-of-District special education placements. Parent asserted that this presentation is evidence of a decision by the District to limit such placements and, in doing so, to deny FAPE to the student in the instant matter. While there was a foundation for the student's parent to testify to this matter, and to an exhibit, the assertion is wholly rejected by this hearing officer. (P-36; NT at 112-123).

21. The April 2014 RR contained behavioral assessments. The April 2014 RR indicates that the student's parent and teachers were supplied with these instruments, but the results did not include any information from adult raters as, the RR indicated, the assessments had not been returned. The only behavioral data was based on the student's self-reports. (S-3 at pages 12-15).
22. In April 2014, the District's re-evaluation process included a 60-minute observation of the student at the Private School in the spring of 2014 but did not include any records request or documentation from the Private School. (NT at 673-676).
23. In May 2014, the private evaluator who had previously evaluated the student in 2012 once again evaluated the student and issued an IEE. (P-16).
24. The May 2014 IEE yielded, through cognitive testing, a general intellectual ability score of 69, with sub-test scores as follows: 33 (visual-auditory learning), 69 (verbal comprehension), 71 (concept formation), 74 (visual matching), 80 (incomplete words), 84 (auditory working memory), 86 (numbers reversed), 93 (spatial relations), and 106 (sound blending). Cluster scores included: 96 (phonemic awareness), 83 (working memory). The student's verbal ability score was 69, thinking ability score was 77, and cognitive efficiency score was 77. (P-16 at pages 12-13, P-17).

25. The achievement and speech/language assessments in the May 2014 IEE were consistent with prior testing. (P-16 at pages 14-23, P-17).
26. The May 2014 IEE continued to recommend that the student be identified as a student with specific learning disabilities, speech/language impairment, and ADHD. (P-16 at pages 25-26).
27. In June 2014, the District revised the May 2014 RR. The May 2014 RR included updated behavior assessments from the student's teachers at the Private School. (S-3 at pages 38-41).
28. The June 2014 RR continued to indicate that the student's mother had been supplied with two behavior assessment instruments but had not returned those instruments. This was inaccurate. The student's mother testified credibly that any paperwork or assessments supplied to her had been completed and returned to the District. This data was not included in the June 2014 RR. (S-3; NT at 646-651).
29. In June 2014, following the issuance of the June 2014 RR, the student's individualized education plan ("IEP") team met to design the student's IEP for the 2014-2015 school year. (S-2, S-4 at pages 14-60).
30. The June 2014 IEP contained 14 goals in the following areas: four in reading, two in mathematics, two in listening comprehension, two in speech/language, two in post-secondary



transition, one in written expression, and one in oral expression.  
(S-4 at pages 32-47).

31. The goals in the June 2014 IEP did not contain any baseline information. (S-4 at pages 32-47).
32. The June 2014 IEP contained a broad assortment of specially designed instruction, supports for school personnel, and the related services of speech/language, occupational therapy, and English as a second language. (S-4 at pages 47-54).
33. The June 2014 IEP calculates that the student will be in the regular education environment for 37% of the school day, but an explanation of the student's placement indicates that the student would be included with non-disabled peers only in physical education, school assemblies, and "activities". (S-4 at 57-60).
34. The June 2014 IEP and notice of recommended education placement indicated that the student would receive all academic instruction in a life skills setting, including pre-vocational instruction and activities of daily living (reading recipes, budgeting, shopping, housekeeping). (S-4 at pages 58-65).
35. The student's parent rejected the proposed program and sought to enroll the student in a private placement for the 2014-2015 school year. (P-23; NT at 141-145).

36. At the Private School over the 2012-2013 and 2013-2014 school years, the student participated in a wholly academic program. (P-30, P-31).
37. In the 2013-2014 school year, the student's 8<sup>th</sup> grade year and final year at the Private School, the student's classes included reading, English, mathematics, science, STEM (science/technology/engineering/mathematics), history, journalism, technology, music, and health/physical education. The student received speech/language instruction and met expectations on six measures of organization and social skills. (P-30 at pages 45-72, P-31).
38. The Private School where the student had attended the 2012-2013 and 2013-2014 school years provided instruction only through 8<sup>th</sup> grade. (NT at 142).
39. Because the student would enter 9<sup>th</sup> grade for the 2014-2015 school year, the student's mother enrolled the student in another private placement (the private placement the student attends in the current 2014-2015 school year and the placement for which the parent seeks reimbursement). (P-33; NT at 141-145).
40. The private placement provides educational programming to students with a variety of learning challenges, including programming specifically targeted to the student. (P-29; NT at 158).

41. The private placement utilized information, and consulted with, the Private School in determining the student's performance, strengths, and needs. The private placement met with the student and the parent prior to enrollment and provides individualized instruction, including one-on-one teaching, in all academic areas. (NT at 156-180).
42. In July 2014, the student's parent filed the special education due process complaint that led to these proceedings. (P-24; S-6).

#### Witness Credibility

43. All witnesses testified credibly. Two pointed factual matters, however, were disputed through testimony—whether records were requested from the Private School and whether the District received completed assessment instruments from the student's parent. The testimonies of the District witnesses were discounted as to these matters and the testimonies, respectively, of the Private School representative and the student's parent were credited. (NT at 56-148, 156-180, 182-216, 230-304, 313-393, 396-441, 452-562, 565-631, 646-659, 673-683).

## **DISCUSSION AND CONCLUSIONS OF LAW**

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

Moreover, both federal and Pennsylvania law require that the placement of a student with a disability be in the least restrictive environment (“LRE”), considering the full range of supplemental aids and services that would allow a student to receive instruction and make progress in the LRE. (34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3<sup>d</sup> Cir. 1993)). 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 use of

supplementary aids and services cannot be achieved satisfactorily.”

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. (22 PA Code §14.145(3)). 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.”( 22 PA Code §14.145(4)).

#### Tuition Reimbursement

Long-standing case law and the IDEA 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 (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also* 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents’ tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

*The June 2014 IEP.* In the three-step analysis, the first step is an examination of the school district's proposed program and whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C.). In this case, the June 2014 IEP proposed by the District is inappropriate.

The June 2014 IEP is not reasonably calculated to yield meaningful education benefit for two reasons. First, the lack of baseline data for any of the student's 14 goals is a fatal flaw. Multiple District witnesses testified that the student's absence from the District, and consequent need to assess the student upon a return to the District, did not allow the District to gauge baseline data and could, arguably, lead to ineffective goals. There is some merit in this argument, but it is rejected for two reasons. One, potentially problematic baseline data is preferable to no baseline data at all. If the argument, again somewhat effective on its face, is that 'we will need to re-visit this data early on in the student's return to the District', that re-visitation can take place to amend baseline data that is problematic as much as it can to create baseline data out of whole cloth. The entire lack of data, however, is a prejudicial flaw in the IEP. Two, the lack of any effort by the District to obtain information about the student's programming and progress at the Private School diminishes the position taken by the District as to benchmark data. Again, the District's argument is grounded in the fact that it had not provided instruction to the student for two school years prior to drafting

the June 2014 IEP. For the District to conduct one 60-minute observation of the student, and request only behavioral data via assessment instruments from the student's teachers at the Private School but not request any records or documentation related to the student's academic programming over those two years renders hollow this argument.

Second, the June 2014 IEP does not propose a program for the student in the LRE. The private placements, both at the Private School and in the current placement for the 2014-2015 school year, are largely academic programs grounded in acquisition of knowledge and academic skills. The focus of the June 2014 IEP on life-skills acquisition is not appropriate. More concerning, however, is that the student would receive all instruction, except for physical education, assemblies, and "activities", in the life skills setting. Granted, the student presents a complex mosaic of abilities and needs. But for the District to offer no instruction in an inclusive setting is a failure to meet the requirements of an offer of FAPE in the LRE.

*The Private Placement.* For the foregoing reasons, the June 2014 IEP proposed by the District is inappropriate. When a school district program is found to be inappropriate at step one of the Burlington-Carter analysis, step two of the analysis is an examination of the appropriateness of the private placement which the parents have selected. In this case, the private placement is appropriate. The

programming of the private school generally is suited to students who experience learning challenges. The student particularly would receive individualized academic instruction and the opportunity for individualized support geared to the student's unique abilities and needs. The private placement for the 2014-2015 school year is appropriate.

*Balancing of the Equities.* Where the school district has proposed an inappropriate program, and parents' unilateral placement in a private setting provides an appropriate program, the third step of the Burlington-Carter analysis involves a balancing of the equities between the parties. Here, the equities do not significantly weigh for, or against, either party.

Accordingly, the parent is entitled to tuition reimbursement.

### **CONCLUSION**

The program and placement proposed by the District for the 2014-2015 school year, as outlined in the June 2014 IEP, is not reasonably calculated to yield meaningful education benefit. The program provided by the private placement is appropriate. And the equities do not impact the determination as to tuition reimbursement. Therefore, the parent is entitled to tuition reimbursement.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the parent is entitled to tuition reimbursement for the unilateral private placement undertaken for the 2014-2015 school year.

To the extent that the parent has been placed in a position to absorb out-of-pocket payment(s) for tuition and fees at the private placement for the 2014-2015 school year, the District is ordered to reimburse parent. Upon presentation to the District by the parent of proof(s) of payment for the 2014-2015 school year, reimbursement shall be made to parent within 60 calendar days of the date the parent presents the documentation. Upon presentation to the District by the parent of any unpaid outstanding balance for the student's 2014-2015 school year, payment shall be made directly by the District to the private school within 90 calendar days of the date parent presents the documentation.

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

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

November 25, 2014