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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.W.

Date of Birth: [redacted]

Dates of Hearing:

July 29, September 16, December 17, 2010
February 11, February 16, February 24, March 24, 2011

CLOSED HEARING

ODR Case # 01297-09-10-AS

Parties to the Hearing:

Parent[s]

Council Rock School District
30 North Chancellor Street
Newtown, PA 18940

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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April 28, 2011

May 3, 2011

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an early teen-aged student residing in the Council Rock School District (“District”) who is a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)¹. Specifically, the student is identified with an other health impairment. The parents have requested tuition reimbursement of a privately funded education placement due to an alleged failure by the District to provide a free appropriate public education (“FAPE”). Particularly, parents claim that reimbursement is owed for alleged failures to provide FAPE in the District programming proposed for the 2009-2010 and 2010-2011 school years. The District maintains that the programming offered to the student in those school years was reasonably calculated to yield meaningful education benefit and, as such, was designed to provide FAPE to the student.

For the reasons set forth below, I find in favor of the parents but tuition reimbursement will be in an amount less than 100%.

ISSUES

Was the educational program proposed by the District for the 2009-2010 school year appropriate?

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.

Was the educational program proposed by the District for the 2010-2011 school year appropriate?

If either, or both, of these proposed programs was/were not appropriate, are parents entitled to tuition reimbursement for the unilateral private placement undertaken for the 2009-2010 and 2010-2011 school years?

FINDINGS OF FACT

1. The student has been diagnosed with a somewhat common genetic syndrome that has potential physical, behavioral, and psychiatric complications that can range from mild to complex. (Parents' Exhibit ["P"]-1; Notes of Testimony ["NT"] at 61-67, 339-357).
2. Specifically, individuals with this genetic syndrome often experience, aside from physical anomalies, learning difficulties, verbal and nonverbal deficits, and difficulties with attention, working memory, executive function, motor skills, academics, mood, and behavior. (P-1).
3. The student's physical, behavioral, and psychiatric complications, as credibly presented by an expert in the study and treatment of the student's genetic syndrome, are quite severe and include certain cognitive, attention, and anxiety disorders, attention deficit hyperactivity, and learning disabilities. (P-1; NT at 344-345).

4. In the 2008-2009 school year, the student attended 6th grade at a District elementary school. The student had goals in reading, writing, mathematics, focus/attention, phonetic speech, and pragmatic speech (including peer conversation skills and decoding meaning). The student received instruction in an autism support setting for reading, writing, and mathematics, with inclusion support in regular education for science and social studies. (School District ["S"]-8, S-9).
5. In the first half of the 2008-2009 school year, the student did not experience behavioral difficulties that were, in the context of the student, not elevated. Beginning in January 2009, however, the student began to exhibit significant acting-out behaviors in school and at home. (NT at 750-751, 753, 755).
6. Over February and March 2009, the student related problems with a peer, began to focus inordinate attention on a second peer, stole items from a teacher, stole papers belonging to a second teacher, and exhibited problematic behaviors at home. (P-7; S-20; NT at 753, 758-774).
7. In March 2009, in response to parental concerns about the student's mood, behavior, and school-avoidance, the student's special education teacher emailed that "I think (the student) is really calling out for some help and attention and (the student) doesn't know how else to proceed." As email exchanges between

- the teacher and the student's mother continued, the teacher related to the student's mother that the student's "behavior is extremely worrisome to me", recommending that the student "should probably be seen by (a private) psychiatrist as soon as (mother) can make an (appointment)." The District's behavior analyst, however, was not consulted regarding these events. (P-7; NT at 1713-1716).
8. In February 2009, parents consulted with a psychiatrist. In mid-March 2009, parents sought a private evaluation from a neuropsychologist with particular expertise in the genetic syndrome affecting the student. (P-1, P-4).
 9. The expert's evaluation report is undated, but the report indicates that the student was tested on March 16, 2009. The record is not clear as to when parents received the expert evaluation. (P-1; NT at 178, 801-802).
 10. On May 7, 2009, the student's individualized education plan ("IEP") team met for its annual review of the student's program. There was some discussion of revisions to the draft IEP. (P-15; S-17).
 11. The May 7th IEP did not address the acting-out behaviors that surfaced in the winter and spring of 2009, or the long-prevalent problematic school behaviors and anxiety which had

been identified by the District over the course of years. (P-6, P-9, P-10, P-11; S-4, S-5).

12. The student's parents left the May 7th IEP meeting with a draft IEP but did not agree with aspects of the program, especially because the student would be leaving an elementary setting to begin the 2009-2010 school year in 7th grade in a junior high school setting. (NT at 159-162, 789, 1604).
13. The parent's expert did not participate in the IEP meeting, and the parents did not have the evaluation report to share with the District prior to, or at, the May 7th IEP meeting. (NT at 155-156, 801-802).
14. The District did not issue a notice of recommended educational placement ("NOREP") for the May 7th IEP, with revisions, until May 29, 2011. The parents returned the NOREP on June 8, 2011, indicating that the parents wished to have an additional meeting with school personnel to discuss the IEP and NOREP. (S-17, S-18).
15. Even though the NOREP had not been issued, in the days after the IEP meeting, the student's special education teacher began to implement the May 7th IEP. (P-15; S-17; NT at 1293-1299).
16. In response to the parents' request, via the NOREP, for a meeting, the parties met on June 12, 2009. Parent's expert did not

- participate in the meeting, and parents did not have the evaluation report to share with the District. (S-22; NT at 801-802).
17. At some point between June 12, 2009 and August 4, 2009, parents received their expert's evaluation report. In a letter dated July 23, 2009, parents informed the District that it intended to place the student privately at District expense. Parents did not include copies of either of the expert reports referenced in their July 23rd letter. (S-23; NT at 579-580, 801-803).
 18. In response to this communication from parents, the District responded that it needed parents' consent to contact the experts and enclosed releases to allow the District to contact the experts. These releases were not returned by parents. (S-23; NT at 274-276).
 19. The student was enrolled at the private placement on August 4, 2009. (NT at 788-789).
 20. The private placement serves students with some degree of learning disability or learning challenge but who are not cognitively impaired. (NT at 558-559).
 21. Instruction at the private placement is individualized with a period of reading instruction, a period of mathematics instruction, and a period of reading/writing language arts instruction. Science and social studies instruction alternates on a weekly basis.

- Instruction also includes physical education, an elective period, and a period of independent study. (NT at 566-568).
22. Teachers at the private placement all have college degrees in the subject area in which they teach. Most have advanced degrees and teaching certificates. (NT at 568-569).
23. The student receives individualized adaptations and instruction. (P-21; NT at 582-587, 591-592, 595-600).
24. The program at the private placement is appropriate for the student. (P-21, P-27, P-28; NT at 557-742).
25. At the outset of the 2009-2010 at the private placement, the student exhibited problematic behaviors. (P-21, P-27, P-28; NT at 596-600, 609-616, 619-631).
26. The student made meaningful education progress at the private placement in the 2009-2010 school year. (P-21, P-28).
27. In March 2010, parents shared with the District their expert reports from February and March 2009. (NT at 185-187, 1768-1769).²
28. In April 2010, the student's IEP team met. Parent's expert participated in the meeting by telephone and answered questions about the genetic syndrome generally and the expert's report specifically. (P-1, P-2; NT at 441-444, 536).

² The fact that the District did not have copies of the reports from parents' experts came to light after parents filed a due process complaint. Parents withdrew the complaint to allow the District to review the report and speak with parent's expert. (NT at 185-187).

29. Having reviewed the parents' expert reports, in May 2010, the District issued a re-evaluation report ("RR"), indicating that the student continued to be eligible for special education but that no further data was required to evaluate the student. The May 2010 RR was issued on the basis of a paper review of other reports, including the parents' expert reports. (P-8; NT at 1865-1869).
30. In June 2010, parents filed the due process complaint which resulted in these proceedings.
31. In July 2010, the District requested permission to re-evaluate the student, indicating that its RR of May 2010 was issued in error when it indicated that no further data was required. The District sought permission to gather data on the student's behavior and academics. Parents did not grant permission. (S-26; 1865-1869).
32. The student returned to the private placement for the 2010-2011 school year and made meaningful education progress. While the student continued to require behavioral supports and strategies, problematic behaviors, especially, diminished in the 2010-2011 school year. (P-28, P-29).

DISCUSSION AND CONCLUSIONS OF LAW

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.³ A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated in IDEIA.⁴

In this three-step analysis, the first step is an examination of the school district's proposed program and whether it is appropriate. To assure that an eligible child receives a FAPE⁵, an IEP must be reasonably calculated to yield meaningful educational benefit to the student.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 Here, the District has denied the student a FAPE by proposing programs for the 2009-2010 and 2010-2011 school years that were inappropriate.

The student has very complex educational needs. (FF 1, 2, 3). While the District's academic programming for those two school years are appropriate, the IEP of May 7, 2009—the only IEP for the student's

³ 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).

⁴ 34 C.F.R. §§300.148(a),(c),(d)(3).

⁵ 34 C.F.R. §300.17

⁶ Board of Education v. Rowley, 458 U.S. 176, 187-204 (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).

educational programming over those years—does not adequately address the student’s complicated behavioral needs. (FF 10, 11). In fact, a review of the student’s history at the District reveals that the District has long been aware of, and seen the need for programming for, consistent behavioral, peer-interaction, and anxiety needs in the educational environment, yet the IEP of May 7, 2009 does not address these needs in a way that is reasonably calculated to yield meaningful education benefit. (FF 4, 10, 11).

Two factors especially highlight this denial of FAPE. First, the record in its entirety reveals a paradox in terms of the District’s evidence. On one hand, the District’s programming is somewhat restrictive: the student received core academics in autism support and received instruction in regular education with highly structured inclusion, all in the context of a student who had presented complex, and at times challenging, behaviors over the course of multiple school years. (FF 4, 11, 12). Yet the District witnesses who had significant contact with the student—the student’s special education teacher, regular education inclusion teacher, and speech and language therapist—all testified that the student presented no significant behavioral challenges. (*See generally* NT at 1009-1067, 1084-1368, 1626-1700). The District’s behavior analyst never had any substantive interaction with the student because he testified that there were no behavioral challenges that required his consultation. (NT at 1713-1716). Weighed in its entirety, the evidence

leads to one of two conclusions: either the District programmed appropriately and District witnesses minimized, at the hearing, the challenges that the student presented, or the District witnesses testified accurately that the student exhibited no problematically challenging behaviors, in which case the student's placement would seem to be overly restrictive and require more inclusive educational settings. Based on the demeanor and non-verbal communication of the teachers and speech/language therapist as each testified about, specifically, the student's behavioral needs and anxiety, it is the considered opinion of this hearing officer that the District witnesses minimized, at the hearing, the challenges the student presented.

Second, and as a pointed example of the above, the student's special education teacher noted multiple instances of newly emergent and deeply problematic changes in the student's behavior in February and March 2009, to the point that the teacher reached out to the student's parent with explicit concerns and recommendations for psychiatric intervention. (FF 5, 6, 7). Yet the District pursued no evaluation process, behavior analysis, or change in programming; indeed, the behavior analyst was not consulted in any substantive way. (FF 7).

Therefore, weighing the record in its entirety, in May 2009, the District did not propose an IEP reasonably calculated to yield reasonable

education benefit, particularly regarding the student's needs in behavior and anxiety.

When the school district's program is found to be inappropriate, as here, the second step is an examination of the appropriateness of the private placement which the parents have selected. Here, the private placement is appropriate. The student's academic programming at the private placement is appropriately designed and implemented. (FF 19, 20, 21, 22, 23), including programming to address the student's needs regarding behavior and anxiety. (FF 25, 32). Over the 2009-2010 and 2010-2011 school years, the student has made meaningful education progress at the private placement. (FF 26, 32).

When the school district's proposed 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 equities for each of the two school years at issue are different.

For the recovery related to the 2009-2010 school year, parents recovery will be reduced. In February 2009, the parents consulted with a psychiatrist regarding the student's drastic change in behaviors, both in school and at home. In March 2009, parents retained an neuropsychologist with particular expertise in the student's genetic syndrome to evaluate the student. (FF 8). As such, as of March 2009,

parents were gathering written opinions and commissioning an extensive evaluation by an exquisitely qualified expert. Yet the District knew nothing about the existence of the report, or even knowledge that an evaluation process was underway, until March 2010 and, even then, it appears that the sharing of the expert reports was an afterthought for parents. (FF 8, 13, 16, 27). And when the District responded to the parents' communication in July 2009 about the private placement and the involvement of experts, parents communicated in a veiled way that experts were involved but not clearly that evaluation reports were in hand or were expected. (FF 17). Nor did parents execute releases provided by the District in its letter to parents to allow the District to have access to these experts. (FF 18).

In short, it is the considered opinion of this hearing officer that the District was placed at a disadvantage in not having, until March 2010, any indication that expert reports were available and/or were being drafted. This determination does not negate the determinations laid out above, but it does change the calculus of the equities for the 2009-2010 school year. Therefore, the amount of tuition reimbursement will be reduced for the 2009-2010 school year.

For the 2010-2011 school year, the equities weigh fully in favor of parents. Once the District became aware of the expert reports, the IEP team convened to hear from the neuropsychologist with particular knowledge of the student's genetic syndrome. (FF 27, 28). Yet the District

RR that followed was a paper review without any consideration of how the newly-surfaced reports, or the fact that the student had been out of the District for nearly an entire school year, might change the District's needs in evaluating the student. (FF 29). Indeed, the author of the District's RR did not participate in the April IEP team meeting, did not have the opportunity to interact with parents' expert, and prepared the paper-review RR over the course of 2-3 days. (FF 28, 29). Only in July 2010, after the filing of a due process complaint, did the District reverse course and request permission to gather more data regarding the student's academic and behavioral performance. (FF 30, 31). As of March 2010, and April 2010 at the latest, the District had enough information to know that a new RR (with fresh data to update its last RR of November 2007) leading to a new IEP process were necessary to design an education program for the 2010-2011 school year. The District did not put itself in such a position, so the determinations above regarding the inappropriateness of the May 2009 IEP and the appropriateness of the private placement remained intact for the 2010-2011 school year. And the equities involved in the run-up to, and present unfolding of, the 2010-2011 school year favor the parents. Full tuition reimbursement for the 2010-2011 school year will be ordered.

CONCLUSION

The record taken as a whole supports a finding that the student has been denied FAPE for the 2009-2010 and 2010-2011 school years due to the District's failure to propose appropriate programming. Full tuition reimbursement for the student's private placement will be ordered for the 2010-2011 school year. The tuition reimbursement for the student's private placement for the 2009-2010 school year, however, will be reduced due to certain equities regarding the position of the parties in the run-up to, and unfolding of, that school year.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student has been denied a free appropriate education for the 2009-2010 and 2010-2011 school years.

Due to the weighing of the equities as set forth above, the student's parents are entitled to 50% of tuition at the student's private placement for the 2009-2010 school year. The District shall reimburse parents for this amount when parents have provided to the District written proof, account statements, and/or receipts from the private placement of their out-of-pocket expense for such tuition.

Due to the weighing of the equities as set forth above, the student's parents are entitled to 100% of tuition at the student's private placement for the 2010-2011 school year. The District shall reimburse parents for this amount when parents have provided to the District written proof, account statements, and/or receipts from the private placement of their out-of-pocket expense for such tuition paid school-year-to-date. In the event that parents have an unpaid balance for the current school year, the District shall pay directly to the private placement the amount of any unpaid balance.

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

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

May 3, 2011