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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: MB
ODR #00260/09-10 KE

Date of Birth:
XX-XX-XXXX

Date of Hearing:
September 24, 2009

CLOSED HEARING

Parties to the Hearing:

Mr.
Ms.

Representative:

Pro Se

Chester County MH/MR Agency
Government Service Center
601 Westtown Road Suite 340
West Chester, Pennsylvania 19382

Bruce Lavery, Esquire
342 E. Lancaster Avenue
Downingtown, Pennsylvania 19335

Interpreters:

Debi Chrisbacher, CDI
Pamela Cospers, CI/CT
Nancy Levine, CI/CT

Date of Decision:

October 6, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.
Certified Hearing Official

Background

The two-and-a-half year old Child who is the subject of this hearing is deaf, and is eligible for Early Intervention services. At the Parents' request the Chester County Mental Health/Mental Retardation Agency (County) has agreed to fund the Child's Early Intervention program at the [Redacted] School for the Deaf (SCHOOL). The Parents requested this hearing, seeking a hearing officer order compelling the County to pay them a stipend, in addition to reimbursement for mileage, for transporting their child to SCHOOL three days per week for the next six months. The parties participated in a mediation one week before the hearing but no resolution was reached. [NT 48-49]

The Child's mother, [Redacted] represented the Parents in this hearing. Therefore, in accord with the Administrative Proceedings Interpreters Act of 2006, P.L. 1538, No. 172 Cl. 02, certified interpreters participated to convey spoken English to the mother and to convey statements made by the mother into English through American Sign Language. Additionally, as is permitted as part of her interpretation duties, one of the interpreters read the father's written testimony¹ into the record to which the County did not object despite the inability to cross-examine the father regarding his testimony. [NT 55-56] Two of the certified interpreters were hearing and one certified interpreter was deaf.² At the beginning of the hearing the Hearing Officer administered an oath to the interpreters in accord with §585 of the Act.

As this hearing involved a Child in the Birth to Three Early Intervention age range, it was required to be completed, including the issuance of a written decision, within 30 calendar days of September 10, 2009, the date on which the Parents' Complaint was received by the Office for Dispute Resolution.

Issue

Must the Chester County MH/MR Agency pay the Parents a stipend in addition to reimbursing them for mileage for transporting their Child to the SCHOOL three days per week for six months?

Findings of Fact

1. The Child is two-and-a-half years old and eligible for Early Intervention services.
2. The Child is deaf, [Redacted]. [NT 28-29]

¹ The father's written testimony was also entered as HO-1. The father was providing child care to the Child at home, and although the County at the Parents' request was prepared to facilitate father's participation in the hearing by videoconferencing, the Parents declined this option the morning of the hearing.

² The Office for Dispute Resolution made a vigorous effort to engage another deaf interpreter but one was not available.

3. At the Parents' request the County has agreed to provide the Child's Early Intervention services at the SCHOOL rather than continuing the current in-home instruction. [NT 31-32]
4. The SCHOOL Early Intervention program runs three days per week for three hours per day. The Child is eligible under the IDEIA [Part C] Birth to Three provisions until a date in spring 2010 when the Child turns three years old, a period of six months.
5. Upon turning three the Child becomes eligible for commercial transport to SCHOOL. [NT 62]
6. Given the Child's age, transportation to SCHOOL by commercial carriers is not available. Both the County and the Parents attempted to secure commercial transportation for the Child without success. [NT 84; P-1, P-2]
7. The Child's "parent" is willing to transport the Child to SCHOOL, but on the condition that "parent" be paid a stipend of \$125 per day for "parent's" time³ and the costs of vehicle maintenance, in addition to a mileage reimbursement of .55 cents per mile for two 27-mile round trips per day⁴ for three days per week. [NT 21, 23, 60; P-2, HO-1]
8. The Parents are requesting a total of \$152.00/\$153.00 per day⁵ for three days per week for transporting their child to SCHOOL for six months. [NT 20-21, 63; HO-1]
9. The County is prepared to reimburse the Parents the standard mileage rate of .505 cents per mile for two 27-mile round trips per day, totaling \$59.40 [or \$59.47 – the record is contradictory] per day, three days per week for six months. [NT 24, 36]

³ The mother's testimony was that the Parents calculated that the father should be paid approximately \$37.50/38.00 per hour for transporting the Child to and from the Early Intervention program at PSD. However it was clear that they had determined what stipend amount they would accept and divided it by the number of one-way trips to derive the hourly compensation rather than placing an hourly dollar value on the father's time. The Parents seem to have arrived at their figure by comparing the value of father's transport of their children to school to the fee estimates of four commercial transport companies, all requiring an escort for a young child [\$35, \$69, \$70 and \$85 per one-way trip]. [NT 38-41; P-1]

⁴ The father was responsible for caring for the Child while the Child's sibling whom he transported was at PSD, thus incurring two round trips per day as the Parents found it impractical to keep the Child waiting for the sibling at PSD for three hours. The Child is currently the youngest sibling and all the children would be in school this year, so ordinarily the father will not have child care responsibility during the three-hour Early Intervention periods. As the father is self-employed and his business is web-based [e-Bay sales] this raises the possibility of his choosing to bring his work with him and stay near or at PSD while waiting for the Child rather than making two round trips daily. [NT 38, 40, 57]

⁵ The exact figure remains unclear, but this is a very close approximation.

10. The “parent” cites the following vehicle expenses associated with transporting Child to SCHOOL: gas/fuel, vehicle maintenance, tire wear, auto insurance, and additional miles on the car reducing the value of the vehicle. [NT 58; HO-1]
11. The “parent” cites the following personal expense associated with transporting Child to SCHOOL: time off from working at home in his on-line business. [NT 58; HO-1]
12. Last year the Child’s sibling attended SCHOOL for Early Intervention and the County did pay the Parents a stipend⁶ in addition to mileage for two round trips per day. The Parents contend that the Child who is the subject of this hearing should be given the same transportation arrangement as the sibling received. [NT 20-22, 27, 35, 37, 40, 45-46, 56-57, 60; P-2, HO-1]
13. The County at the time had no other Early Intervention program option for the sibling because a teacher who would travel could not be located, so the County agreed to pay the father to transport the sibling to SCHOOL. [NT 68-69]
14. In contrast to the sibling’s having no Early Intervention alternative, the County believes that the program currently offered to the Child in the home [specialized instruction with a hearing teacher and an interpreter and physical therapy] is an appropriate program. [NT 71-72]
15. The Parents and the County negotiated the amount of payment for transporting the sibling. The Parents will not accept less for transporting their Child to SCHOOL than they were given to transport the sibling. [NT 62, 69-70]
16. The County determined its offered mileage-only reimbursement for transportation for the Child by consulting PA Early Intervention regulations. [NT 65-66]
17. The County has determined that paying a stipend to the Parents for transporting their child exceeds the provisions of the regulations. [NT 72]

Discussion and Conclusions of Law

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, for cases brought under the IDEA, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must

⁶ Although the record is not clear, the stipend to the Parents for transporting the sibling may have been passed through a community agency. [NT 33-34]

prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. In the instant matter, the evidence was not in equipoise. The Parents, by not presenting a preponderance of the evidence, nor even equally balancing the County's, can not prevail regarding the issue of payment for transporting their child to their favored Early Intervention program. The County, by presenting a preponderance of the evidence, met its burden of persuasion on the single issue addressed in this hearing.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.⁷ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

Having been found eligible for special education, the Child who is the subject of this hearing is entitled by federal law under IDEIA, Part C and by state law PA Chapter 55 §4226 to receive a free appropriate public education (FAPE) through Early Intervention Services. There is no dispute that the Child is an eligible child, and there is no dispute regarding the planned location of the Child's Early Intervention Services at SCHOOL. This dispute involves a supportive service, transportation.

Supportive services, such as "transportation and related costs", are sometimes required in order for a child to receive FAPE. PA Chapter 55 §4226.5 provides that "Transportation and related costs", "Includes the expenses incurred in travel (such as mileage or travel by taxi, common carrier, or other means and other costs or tolls and parking expenses) that are necessary to enable an infant or toddler with a disability and the infant or toddler's family to receive another early intervention service".

Although the County is prepared to reimburse the family for mileage incurred in transporting the Child to SCHOOL, it is not willing to pay the "parent" a stipend for providing the transportation. [FF 9, 16, 17]

In this matter, as it relates to credibility, both parties offered testimony unsupported by

⁷ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

facts. The County sought to present hearsay evidence that in an off-the-record conversation an auditor chastised the County for exceeding regulations last year by paying the “parent” a stipend in addition to reimbursement for mileage for transporting the sibling. Such a reproof was not found in writing in any of the many pages of the Exhibits C-3, C-4 and C-5. Rather it seemed clear that the criticism the County endured related to provision of services to the sibling had to do with the location of services, not to the stipend. By the same token, the Parents asserted that the “parent”, who operates an on-line business selling items on e-Bay, lost time from working in “parent’s” business by transporting the sibling to SCHOOL and will lose time “parent” could have spent on “parent’s” business transporting the Child to SCHOOL. [FF 11] The Parents valued the time at approximately \$37.50 per hour, ostensibly to offset the loss of potential income. The “parent’s” explanation of how this figure was derived clearly indicated that the Parents required a certain payment for transporting their child, a figure that they then justified by shoehorning it into an hourly figure representing potential business income. [FF 7, 8] This hearing officer was unable to find case law directly on point, although it is noted that the federal court in *J.P vs. Hanover School Board of Hanover County, M.D.* Va. Civil Action No. 3:06cv28, June 2, 2009 cited an exact written accounting from credit card statements in evidence as a basis for concluding that reimbursing parents for credit card processing fees related to private school tuition payments was a direct cost the parents otherwise would not have incurred. The Parents in this matter failed to provide a credible direct accounting of a potential loss of income, or any proof that income actually would be lost. As on-line business can be conducted any time of the day or night, and “parent” was in fact responsible for the then one-year-old Child’s daycare during the time “parent” was transporting the sibling to SCHOOL, the Parents did not establish facts to support a potential loss of income directly related to transportation last year or this year. Moreover, given that there are no longer child-care issues if the Child attends SCHOOL, the “parent” could choose to bring “parent’s” paperwork to SCHOOL or a nearby location rather than travel back and forth twice per day.

The parties each made two valid points. First, the “parent” cited vehicle costs involved in transporting the Child. [FF 10] Mileage reimbursement is designed to cover exactly those costs that the “parent” enumerated in his testimony. Second, the County cites the definition of Transportation in the regulations which in this hearing officer’s view cannot stretch to include paying parents for duties, such as taking their children to school and to therapy, that parents normally assume in the day to day course of raising children whether or not the child has a handicap.

The Parents benefited from the County’s decision, for whatever reason, to go beyond the regulations last year. [FF 12] Their position in the current matter is understandable, but they have not met their burden of proving that the County must pay the “parent” for transporting the Child to SCHOOL simply because they paid for the sibling’s transport last year. The County has the right to refuse to go above and beyond the regulations at this time even though it did so in the past, and this hearing officer has no authority to compel the County to go beyond the statutory regulations given the facts of this case.

Order

It is hereby ordered that:

The Chester County Office of Mental Health and Mental Retardation is not required to pay the “parent” a stipend to transport Child to the SCHOOL.

The County must reimburse the Parents for actual mileage to and from SCHOOL at the currently established mileage rate that applies to County Office of MH/MR employees.

October 6, 2009
Date

Linda M. Valentini, Psy.D.
Linda M. Valentini, Psy.D.
PA Special Education Hearing Officer
NAHO Certified Hearing Official