

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

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

5996/05-06 LS

File Number

R.F.

Child's Name

XX/XX/XX

Date of Birth

1/23-24/06

Dates of Hearing

Closed

Type of Hearing

For the Student:

Parents

For the Lower Merion School District:

Dr. Michael Kelly, Director of Special
Education
Lower Merion School District
301 E. Montgomery Avenue
Ardmore, PA 19003-3338

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Dates of Hearing:

January 23 and 24, 2006

Receipt of Transcript:

January 30, 2006

Date of Decision:

February 13, 2006

Hearing Officer:

Daniel J. Myers

BACKGROUND

(Student) is a [teenaged] resident of the Lower Merion School District (School District) with attention deficit disorder (ADD), a speech/language impairment, deficits in visual processing and working memory, and a specific learning disability in the areas of written expression and math. His parents have rejected the School District's proposed educational program and placement in its middle school, and they have enrolled Student in the Private School D. Student's parents now request reimbursement of their Private School D tuition. For the reasons described below, I find for the School District.

ISSUE

1. Whether or not Student's parents are entitled to tuition reimbursement for the 2005-2006 school year.

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a [teenaged], 7th grade resident of the Lower Merion School District (School District.) (SD 9)¹ He has attention deficit disorder (ADD), a speech/language impairment, deficits in visual processing and working memory, and a specific learning disability in the areas of written expression and math. (N.T. 21) It is undisputed that Student processes slowly, needing small educational settings. (N.T. 22-23)
2. Student has never attended public school. (N.T. 20-21, 103)
 - a. Student attended Private School A for kindergarten (1998-1999). (SD 5; N.T. 86)
 - b. He attended Private School B for 1st grade (1999-2000) through 4th grade (2002-2003). (P 8)
 - c. He attended Private School C for 5th grade (2003-2004) and 6th grade (2004-2005). (N.T. 87)
 - d. Currently, Student is attending Private School D for 7th grade (2005-2006).

Preschool

3. Prior to 1998, while in preschool, Student demonstrated various developmental delays and received language enrichment therapy and fine-motor occupational therapy (OT) from the Intermediate Unit (IU). (SD 1, p.2)

Kindergarten (1998-1999)

4. In 1998, a School District evaluation recommended:

¹ References to N.T. are to the transcript of the January 23 and 24, 2006 hearing sessions. References to SD, P and HO are to School District, Parent and Hearing Officer exhibits, respectively.

- a. Continued weekly direct OT to address significant delays in fine motor skills.
- b. Continued weekly direct speech therapy in a small group setting. (SD 2, p.7) and
- c. A highly structured part time learning support kindergarten classroom with a small teacher/child ratio to assist in developing behavioral controls and kindergarten readiness skill. (SD 3; SD 4; N.T. 86)

Kindergarten through 3rd grade

5. Between 1998 and 2002 (Student's Kindergarten through 3rd grade years), Student received privately-secured OT services to develop fine motor skills, practice handwriting, and promote visual-spatial organization. (N.T. 59, 62)

4th grade (2002-2003)

6. In Spring 2003, Student was evaluated by Dr. T, a pediatric and adult neuropsychologist. (SD 6)
 - a. The Wechsler Intelligence Scale for Children, Third Edition, indicated an average range verbal IQ score of 98 (45th percentile) and significantly below average performance IQ score of 65 (1st percentile,) resulting in a Low Average full scale IQ of 81 (10th percentile.)
 - b. Dr. T observed impairment of visual-spatial processing, below grade level achievement in reading, writing and math, and difficulties with phonological decoding.
 - c. She diagnosed a developmental reading disorder and a non-verbal learning disability.
 - d. She recommended continued placement in a special education school with structure and clear boundaries, repeated exposure to material, extra time for processing, continued speech therapy, medication for attention difficulties, consultation with an OT to address poor perceptual organization and visual-motor integration, and social skills training. (SD 6, p 10)

6th Grade (2004-2005)

7. On or about March 3, 2005, Dr. T evaluated Student again. (SD 7)
 - a. Student's WISC IV Full Scale IQ score was 92, with an average range verbal comprehension score of 106 (66th percentile), an average range perceptual reasoning score of 106 (66th percentile), a borderline psychomotor speed score of 70 (2nd percentile), and a low average working memory score of 83 (13th percentile.) (SD 7)
 - b. Student's teacher reported that Student's instructional levels in reading and writing were the 3-2 level, and 5th grade in math. (SD 7)
 - c. Dr. T observed significant gains in cognitive abilities, but recommended continued placement in a special education setting to further enhance Student's functioning. (SD 7)
 - d. Student's parent contends that Dr. T's reference to a special education "setting" was intended to refer to a special education "school." (SD 7, p.3; SD 6, p.9)

8. In April or May 2005, Student's Private School C informed Student's parents that Student needed a different school for 7th grade. (N.T. 88)
9. Student's parent then contacted the School District, which requested permission to evaluate Student on May 13, 2005. (N.T. 98; SD 8)

7th grade (2005-2006)

10. On June 17, 2005 the School District issued an evaluation report. (N.T. 91; SD 9)
 - a. The School District's psychological evaluator was Dr. F, who is a school psychologist working primarily at the middle school. (N.T. 116) She has been certified in school psychology since 1983, and she is a nationally certified school psychologist and a state-licensed psychologist. (N.T. 116)
 - b. Student's Wechsler Individual Achievement Test, second edition, (WIAT-II) indicated lowest average range reading at the 23rd percentile, reading comprehension at the 27th percentile, reading decoding at the 32nd percentile, low average math computation skills at the 13th percentile, math concepts skills at the 19th percentile, and written expression skills at the 2nd percentile. (N.T. 126-127)
 - c. The School District's speech and language evaluation indicated solid average phonological awareness but weak word retrieval skills, difficulties with auditory memory, and slow processing speed. (N.T. 276, 290)
 - d. Consistent with Dr. T's recent WISC-IV results indicating slow visual and auditory processing speed, as well as Student's low WIAT-II written expression scores, Dr. F observed that writing would be extremely difficult and laborious for Student, and that would need additional time for writing activities. Dr. F concluded that Student's auditory and visual processing deficits significantly affect Student's written expression skills. (N.T. 155)
 - e. Dr. F also concluded that there may have been some gaps in Student's math instruction. She further concluded that Student needs organizational and time management assistance. (N.T. 134, 153)
 - f. Dr. F noted that no social, emotional or behavioral concerns were raised. (N.T. 131) Student was cooperative and determined to do well during testing. (N.T. 156)
11. On or about July 11, 2005, Private School D had accepted Student for admission, although Student's parent was not sure at that time whether or not Student would attend Private School D. (N.T. 93)
12. On July 14, 2005 Student's parent and the School District conducted an IEP meeting. (N.T. 81, 97, 100, 217; SD 11; SD 12; SD 13)
 - a. The School District recommended a part-time learning support placement for three periods per day (Reading, Language Arts, and Resource Room) to focus on written expression and reading comprehension, as well as thirty minutes of weekly speech and language therapy. (N.T. 101, 137-138, 196, 281, 290, 295, 298; SD 11, p. 10-11, 22)

- b. The learning support class contains 12 seventh grade students, ages 12 and 13, with a teacher and an instructional aide in the classroom. (N.T. 188, 190, 219, 224; SD 15, p. 27)
- c. Student would attend regular education math and science classes, as well as regular education lunch and specials. The math class, containing 10-12 students, would be co-taught by a regular education teacher and a special education teacher, and it would include at least one instructional aide. (N.T. 163, 166-167, 189-190, 193, 229, 231, 316)
- d. Student's teachers and therapists would meet weekly to coordinate their activities. Regular education class activities would be reinforced in the resource room, when necessary. (N.T. 189, 202-203, 234)
- e. Among the proposed program modifications and specially designed instruction to address Student's slow processing speed were extended time, clarification and repeating of directions, access to a computer, notes from teachers or peers, and increased experiential learning opportunities. (SD 15, SD 20; N.T. 145, 147, 180, 199)

13. Sometime during Fall 2005, Student's parents unilaterally enrolled Student into Private School D.

- a. This is a coeducational day school for 191 students in grades 7-12 who have learning differences, most of which are language-based learning differences. (N.T. 326-327) There are twenty-one 7th graders in the school. (N.T. 434)
- b. This school is accredited by the Pennsylvania Association of Independent Schools. (N.T. 431) It has 45 faculty members, of whom fewer than one-half have Pennsylvania teaching certification, and one of whom has Pennsylvania special education teaching certification. (N.T. 409)
- c. No classes are larger than 9 students. (N.T. 334)
- d. Every student has his or her own laptop computer. (N.T. 334)
- e. Tuition is \$27,800 for the 2005-2006 school year. (N.T. 26, 437; P 6)
- f. Teachers are trained in the Orton Gillingham approach, and students learn about their own learning differences and how to accommodate them. (N.T. 329)
- g. Student's small classes allow for individualization of instruction. His language arts class meets daily for 47 minutes, with 5-6 students grouped by ability. (N.T. 333) To address Student's receptive language delays, his teachers check back with him for understanding, and the small classes accommodate his need to slow down and rehearse when necessary. (N.T. 346) He meets with an advisor twice daily to assist with organization. (N.T. 337) So far, Student is receiving Bs in his classes. (N.T. 341)
- h. Student does not receive OT or speech and language services. (N.T. 410)
- i. The principal of Private School D testified that Student's history of private special education schools indicates his need for increasing intensity in remediating his language deficits. She believes that the pace of regular education is too fast for Student. (N.T. 379, 385)

14. On September 14, 2005, the IEP team met again to respond to the request of Student's parent for clarification of the School District's proposed program and placement. (SD

- 15; SD 16; SD 17; NT. 81, 104, 106, 217-218) Because Student's parent was concerned about the large size of the middle school, the School District recommended adding a social worker's services to the IEP to help Student's transition to the middle school. (SD 15, p. 12; SD 11, p. 23; SD 17; N.T. 140-141, 193, 218)
15. Neither party believes that Student requires direct OT services. Student's former OT testified at the hearing that Student's very slow processing ability causes labored and slow handwriting, for which she would ordinarily work weekly on a consultative basis with Student's teacher, rather than directly with Student. (N.T. 41-42, 64-65)
 16. On or about October 10, 2005, Student's parent rejected the School District's Notice of Recommended Educational Placement. (SD 16)
 17. On or about October 27, 2005, the School District filed with the Office for Dispute Resolution the request of Student's parent for a due process hearing. (SD 18) I was assigned as hearing officer to this matter on November 8, 2005.
 18. A hearing was conducted in this matter on January 23 and 24, 2006.
 - a. I denied the request of Student's parent to sequester the witnesses. Her request was based upon a general concern that the presence of School District supervisors while their employees testify may intimidate the witnesses. I noted that sequestration is a time-consuming activity and, absent a more specific concern regarding witness credibility, the cost outweighed the benefit. (N.T. 13)
 - b. Student's parent also noted that she was unaware, until the day of the hearing, that she could have asked me to subpoena Dr. T to appear at the hearing. Rather than request a postponement of the hearing (which I likely would have denied), Student's parent asked that I pay very close attention to Dr. T's written reports. (N.T. 15, 17-18; SD 6; SD 7)
 19. School District exhibits SD 1-22 were admitted without objection and SD 23 was admitted over objection. (N.T. 443) Student's exhibits P 1-7, 9 and 11 were admitted without objection. P 8, 10, 12 and 13 were admitted over objection. (N.T. 446-451)
 20. Student's parent submitted written information from Dr. T and from psychiatrist Dr. P, both of whom support Student's attendance at Private School D, but neither of whom testified at the hearing subject to cross-examination.
 - a. Dr. T's 2003 evaluation report explicitly recommends a special education school, while her 2005 report recommends a special education setting. (SD 6; SD 7) Student's parent contends that Dr. T's reference to a special education "setting" was intended to refer to a special education "school." (SD 7, p.3; SD 6, p.9)
 - b. Dr. P considers Private School D, "with its small class size and highly individualized instruction" to be the optimal educational environment for Student. He further notes that "the normal-sized classes found in a public school would quickly overwhelm" Student. (P 10)
 - c. I do not find either of these experts' opinions to be credible in assessing the appropriateness of the School District's proposed program and placement. While

I am willing to assume that both experts have an understanding of Private School D's program, based upon reports from Student's parent, there is no basis in the record for believing that either expert had any realistic understanding of the class sizes and nature of instruction proposed by the School District.

21. This decision is issued:

- a. 109 days after the due process hearing request;
- b. 97 days after my assignment as hearing officer;
- c. 20 days after the due process hearing; and
- d. 14 days after my receipt of the transcript.

DISCUSSION

There are three prongs to the decision to award reimbursement for a parent's unilateral placement of a student at a private school. First, the School District must show that it has offered Student a free appropriate public education (FAPE.) Second, if the School District does not prevail on the first prong, Student's parents must show that Private School D is appropriate for Student. Third, if the School District has not offered FAPE and if Private School D is appropriate, then I must weigh the equities in the case. Florence County School District 4 v. Shannon Carter, 510 U.S. 7, 126 L.Ed.2d 284, 114 S. Ct. 361 (1993); School Committee of the Town of Burlington, Mass. v. Dept. of Education of Mass., 471 U.S. 359, 105 S. Ct. 1996 (1985)

An appropriate School District program is one that is provided at no cost to the parents, is individualized to meet Student's educational needs, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. Rowley v. Hendrick Hudson Board of Education, 458 U.S. 176, 102 S. Ct. 3034 (1982) The appropriateness of the IEP is based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993)

The purpose of the IEP is not to provide the "absolute best education" or "potential maximizing education" for the child. The IEP must simply propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993); Susan N. v. Wilson School District, 70 F.3d 751 (3d Cir. 1995); In Re K.N. and Bethlehem Area School District, Special Education Opinion No. 1225 (2002) The IEP must be likely to produce progress, not regression or trivial educational advancement. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989); Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986)

In addition, the School District is required to educate children eligible for special education services within the regular classroom "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550; 22 Pa. Code §14.102(a)(2)(xxiv) This requirement is variously called "inclusion," "mainstreaming," and "LRE" or "least restrictive environment." Oberti v. Board of Education of Clementon School District, 995 F.2d 1204, 19 IDELR 908 (3rd Cir. 1993) Courts have long recognized the tension between the strong preference for

mainstreaming/inclusion, and the requirement that schools provide appropriate individualized programs tailored to the specific needs of each disabled child. Oberti, *supra*.

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. Schaffer v. Weast, __U.S. __, Dkt. No. 04-698 (Nov. 14, 2005) In this case, Student's parent has not met her burden of proving the first prong of a reimbursement case, i.e., that the School District's proposed program and placement is not appropriate for Student.

In this case, there is little dispute regarding Student's educational needs. He has ADD, a speech/language impairment, a specific learning disability in the areas of written expression and math, deficits in visual processing and working memory, and he processes slowly, requiring small educational settings. (N.T. 21-23) The School District has offered an educational program and placement that meets those needs. Specifically, the School District recommended a part-time learning support placement for three periods per day (Reading, Language Arts, and Resource Room) to focus on written expression and reading comprehension, as well as thirty minutes of weekly speech and language therapy. (N.T. 101, 137-138, 196, 281, 290, 295, 298; SD 11, p. 10-11, 22)

In addition, neither party disputes Student's need for a small learning environment. Private School D offers no classes larger than 9 students, and Student's language arts class contains only 5-6 students with one teacher. (N.T. 333-334) The School District also has proposed small class sizes. Specifically, it proposes a learning support class of 12 students, with a teacher and an instructional aide in the classroom. (N.T. 188, 190, 219, 224; SD 15, p. 27) It also proposes a small regular education math class, containing 10-12 students, co-taught by a regular education teacher and a special education teacher, that would also include at least one instructional aide. (N.T. 163, 166-167, 189-190, 193, 229, 231, 316)

A major difference between the School District's proposal and Private School D is in the overall size of the school buildings. Private School D has only 21 seventh grade students in the entire building, and fewer than 200 total students in grades 7-12. (N.T. 326-327, 434) There is no evidence in the record, however, Student also requires a small school building, as long as he receives small class instruction. Nevertheless, the School District's proposed program and placement does respond to parental concerns about the large size of the middle school with a social worker's services to help Student's transition to the middle school. (SD 15, p. 12; SD 11, p. 23; SD 17; N.T. 140-141, 193, 218) I find that the School District's proposed program and placement meets the School District's responsibility to offer an appropriate education in the least restrictive environment.

The Private School D program described at the hearing sounds excellent and, but for its lack of direct speech and language therapy, quite appropriate for Student. Analysis of the Private School D program, however, is the second prong of the three-prong tuition reimbursement test. It is not necessary for me to move to either the second or third prongs of the tuition reimbursement test, in this case, because the School District has satisfied the first prong. The School District's proposed program and placement for 2005-2006 is appropriate. Accordingly, the request of Student's parents for reimbursement of Private School D tuition is denied.

CONCLUSION

The School District's proposed program and placement for 2005-2006 is appropriate. Accordingly, the request of Student's parents for reimbursement of Private School D tuition is denied.

ORDER

For the reasons described above, I ORDER that:

- The request for tuition reimbursement is DENIED;
- No further action is required of the School District at this time.

Daniel J. Myers

Hearing Officer

February 13, 2006

Re: Due Process Hearing
File Number 5996/05-06 LS
Student

School District