

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.

Due Process Hearing for S.L.

Date of Birth: xx/xx/xx

ODR File Number: 5773/05-06/AS

Dates of Hearing: 10/26/05, 11/2/05, 11/29/05, 12/1/05

CLOSED HEARING

Parties:

Parent(s)

School Dist. Of Philadelphia
440 N. Broad St.
Philadelphia, PA

Representative:

Heidi Konkler Goldsmith, Esq.
McAndrews Law Offices
30 Cassatt Ave.
Berwyn, PA 19312

Deborah Greenfield DeLauro, Esq.
440 N. Broad St.
Philadelphia, PA 19146

Date Transcript/Exhibits Received:

December 6, 2005

Date of Closing Statements/Record
Closure:

December 12, 2005¹

Date of Decision:

December 31, 2005

Hearing Officer:

Joy Waters Fleming, Esq.

¹ Counsel agreed to an extension of an additional (3) days for the filing of the decision in this matter, until 12/31/05

Background

Student, “Student”, is currently xx years of age and currently in the tenth grade at a private residential school, the [Redacted] School. Prior to his attendance at [Redacted Private School], Student attended [Redacted] School for ninth grade and [Redacted] School until the eighth grade. Student is eligible for special education on the basis of a specific learning disability (neurological impairment) and a hearing impairment. (FF. 1-5) This due process hearing was requested by his parents, Parent(s), “Parents”.

Issues

1. Is the proffered IEP for the 2005-2006 offering a program and placement at the [Proposed] School appropriate?
2. If the proffered IEP is not appropriate, are Parents owed reimbursement for Student’s attendance at the [Redacted Private] School for the 2005-2006 school year?

Findings of Fact

1. Student, “Student”, is currently xx years of age and in the tenth grade at the [Redacted Private] School.
2. Student is eligible for special education because of specific learning disability and a hearing impairment. (SD-11, N.T. 245, 532)
3. Student is a resident of the School District [Name Redacted], “District”. (SD-1)

4. At 23 months of age, Student was diagnosed with severe to profound sensori-neural bilateral hearing loss. (P-1)
5. Student's hearing loss is correctable from 80 to 85 decibel level to 30 to 35 decibels with amplification. (P-1)
6. During the 2003-2004 school year, Student attended the eighth grade at the [Redacted] School at public expense. (SD-11)
7. On March 19, 2004, after a District conducted occupational therapy assessment, the District recommended that Student receive OT to improve his cursive writing legibility and speed. (SD-4, SD-13, SD-14, N.T. 321) ²
8. On March 24, 2004, Dr. W conducted a psycho-educational evaluation of Student. (P-2)
9. Dr. W administered the Woodcock-Johnson III (WCJ-III) and the WIAT II to Student. (P-2)
10. Student's scores on the WIAT II indicated upper end of below average performance in word decoding, pseudoword decoding and reading comprehension with nearly average written expression and average spelling skills. (P-2)
12. Dr. W concluded that Student was functioning on or nearly on grade level in word reading, spelling and written expression. (P-2)
13. Based on the evaluation, Dr. W concluded that Student would best be served in a specialized school characterized by small class size, highly individualized teaching, structured peer contacts and social experiences, multimodality presentations, willingness to accommodate students with atypical learning profiles. (P-2)
14. On March 30, 2004, the District conducted a re-evaluation of Student. (P-1)

² Through a compensatory education amendment to the IEP, Parents agreed that Student would be provided with fifteen, 30 minute occupational therapy sessions between September 2005 and June 2006. Occupational therapy is not an issue for the current school year.

15. As part of the re-evaluation, the District reviewed the results of the Wide Range Achievement Test administered in September 2003 as well as a summary of Student's academic, social, physical and occupational therapy needs as reported by the [Redacted] School. (P-1)
16. On the WISC-IV, administered by the District, Student received a verbal comprehension index score of 73, a perceptual reasoning index score of 88, a working memory index score of 77 and a processing speed index score of 56. (P-1)
17. Based on his scores on the WISC-IV, the evaluator credited Student with an IQ score of 88. (P-1)
18. On the Beery-Buktenica test of visual motor integration, Student received a standard score of 60, which is below the 1st percentile. (P-1)
19. Based on the testing, the evaluator concluded that Student exhibited weaknesses in verbal comprehension and working memory, severe deficits in processing speed, inferior academic skills, and difficulties with attention, concentration, information processing and social maturity. (P-1)
20. Based on the testing, the team recommended that Student receive learning support services with specially designed small group instruction in an alternative educational setting in order to address deficits in written expression, reading comprehension and math as well as fifteen, 30 minute sessions of occupational therapy, and consultation, one time per month with a hearing therapist. (P-1)
21. In April 2004, Parent communicated to District their preference for Student's enrollment at the [Redacted] School, a private college preparatory school, to which the District agreed. (SD-9, SD-11, N.T. 215, 221-222, 284)

2004-2005 School Year

22. During the 2004-2005 school year, Student attended the ninth grade at the [Redacted] School, a non-approved private school funded by the District. (SD-18, N.T. 165, 483)
23. In early 2005, [Redacted School] notified Parents that its school was not appropriate for Student. (N.T. 253)
24. The District offered a one to one assistant for Student at [Redacted School] but the school declined that intervention. (N.T. 268, 270)
25. In February 2005, the District contacted the [Proposed] School, Mainline Academy, Vanguard School, Ambler Day School, Delta Wordsworth and the Delaware County Friends School about potential placement of Student. (N.T. 192, 630)
26. On March 3, 2005, Parent gave permission to the District to conduct a speech/language assessment of Student. (SD-15, N.T. 349)
27. On the permission to evaluate and in a subsequent conversation, Parent indicated concerns about Student's speed, organizational problems, speech clarity, articulation and drooling. (N.T. 350, 397)
28. On March 22, 2005, the District administered a speech and language assessment to determine Student's strengths and needs in speech. (SD-16)
29. Based on testing, the speech clinician concluded that Student had deficits in understanding non-literal spoken language like figurative language and sarcasm and that he needed a speech program designed to improve his overall speech intelligibility. (SD-16, N.T. 353, 376, 386)
30. Between April 2005 and June 2005, the District provided speech services to Student at the [Redacted] School. (SD-17, N.T. 357-358, 361, 366-369)

31. On April 18, 2005, the IEP team met, at the [Redacted] School, in order to draft an IEP for the remainder of the 2004-2005 school year and the 2005-2006 school year. (SD-1, SD-18, N.T. 405)
32. Under the present levels of educational performance, the [Redacted] School indicated that Student was able to read but exhibited difficulties grasping abstract concepts and working at an independent level, that he required one to one assistance. (SD-18, N.T. 406-407)
33. Although no specific reading, math, or written language grade levels were reported under the PLEP, the District, based on data provided by [Redacted School], was able to surmise Student's skill levels in comprehension and math. (SD-1, N.T. 518)
34. In the proposed IEP, Student's strengths were identified as having good word recognition skills, improving math. (SD-1)
35. In the proposed IEP, Student's needs were identified as frequent re-direction, a multi-sensory approach and help understanding and responding to social cues and language. (N.T. 34-36)
36. The proposed IEP contained reading, writing, math and speech and social skills goals. (SD-1, N.T. 417)
37. During discussion of transition goals, Parents expressed an interest in college preparation as opposed to vocational goals. (SD-1, p. 10, N.T. 478)
38. No functional behavioral assessment occurred of Student because the IEP team concluded Student did not exhibit behavior that impeded learning (N.T. 86, 463)
39. On April 20, 2005, Student and his Parents met with the [Proposed] School. (N.T. 562-563, 568, 631)
40. At the [Proposed] School, Student underwent interviews received various reading and math probes, a social skills and speech and language assessments. (N.T. 562-563, 568, 631)

41. The District provided the IEP to the [Proposed] School after the April 18, 2005 IEP meeting. (N.T. 618-619)
42. On April 21, 2005, the [Proposed] School informed the District that Student was acceptable for admission in the 2005-2006 school year. (N.T. 189)
43. On April 28, 2005, [Private School] accepted Student for admission. (N.T. 633, 646)
44. On May 6, 2005, the IEP team reconvened and modified the IEP by adding expected levels of achievement in social skills areas, updating the related services. (N.T. 482)
45. On May 6, 2005, the District, through a NOREP, offered Student placement at an alternative special education setting on a day basis with speech and hearing consultation and direct speech services once a week for 40 minutes. (SD-2, N.T. 50, 422)
46. On May 6, 2005, Parents did not approve the NOREP recommending placement in a day educational setting and informed the District of their desire to have Student placed at [Private School]. (SD-2, N.T. 421)
47. On May 6, 2005, the District and Parents participated in a pre-hearing conference which failed to result in resolution. (SD-6)
48. In May 2005, Parents informed District of their intention to enroll Student at [Private School], a private residential school. (SD-6)
49. Although Parent did not approve the NOREP recommending a day setting, speech language therapy commenced consistent with the April IEP.
50. By letter of May 11, 2005, the [Proposed] School offered admission to Student for the 2005-2006 school year, indicating that it would conduct further diagnostic and placement tests throughout the first 30-45 of enrollment (SD-1, SD-3, N.T. 154, 189, 274, 468)

51. From April 28, 2005 through June 3, 2005, the District provided speech language therapy to Student at the [Redacted] School. (SD-17)
52. By letter of June 1, 2005, [Redacted] recommended that Parents find an alternative placement for Student for the 2005-2006 school year that could provide more individualized attention and instruction. (P-3, N.T. 223)
53. [Redacted School] specifically recommended a program that would incorporate career education, life skills education and the development of self awareness to enable him to be successful should he choose to continue his education or to gain employment. (P-3, N.T. 224-225)

2005-2006 School Year

54. The [Proposed] School is a private school approved by the Pennsylvania Department of Education to offer education to learning disabled, socially/emotionally disturbed, autism/PDD, mentally retarded, speech/language impaired, brain damaged, physically handicapped and visually impaired students. (SD-12, SD-20, N.T. 166)
55. [Proposed] School utilizes elements of Wilson reading programs and Orton-Gillingam research based multi-sensory reading program to provide direct instruction to its students. (N.T. 166, 262, 470)
56. All teachers at the [Proposed] School are special education certified with an average classroom size of six to twelve. (N.T. 471-472)
57. In addition to extensive career exploration, vocational training and post-secondary educational options, the [Proposed] School offers extended social skills groups beyond the school day, recreational programming as well as an after school sports program. (SD-12, N.T. 167, 226-227, 243-247, 475,)
58. The social skills groups at the [Proposed] School is integrated within The vocational and academic programming. (N.T. 492)

Discussion

This case presents the narrow issue of the appropriateness of the District's proffered program at the [Proposed] School, an approved private school.³ Parents have unilaterally placed Student, out of state, at the [Private School,] a residential school maintaining that it is more suitable for Student. They now seek tuition reimbursement.

It is undisputed that tuition reimbursement depends on a three-step analysis starting with whether the District's proposed IEP/NOREP is appropriate. Under this analysis, tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school does not provide free appropriate public education, "FAPE", and the private placement is proper. Florence County School District v. Carter, 510 U.S. 10 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985). The well-recognized analysis regarding a claim for tuition reimbursement is outlined in the seminal cases School Committee of Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985) and Florence County School District v. Carter, U.S. , 126 L.Ed. 284 (1993), and their progeny (hereinafter "Burlington-Carter"). The Burlington-Carter analysis involves three steps: First, has the district proposed an appropriate program/placement? If not, second, is the private program/placement appropriate? If so, third, do the equities between the parties justify an award of tuition?

Under the first prong, the appropriateness of the District's proffered program and placement must be addressed. The IDEA requires that states provide a "free appropriate public education" "FAPE" to all students who qualify for special education services. 20 U.S.C. §1412. In Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Rowley standard is only met when a child's program provides him or her with more than a trivial or *de minimus* educational benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853

³ Prior to the start of the hearing, Parents raised the issue of the appropriateness of the application of IDEIA 2004 as opposed to IDEA 1997. A pre-hearing ruling with respect to the application of the IDEA was made and can be found as HO-1.

F.2d 171 (3rd Cir. 1988). Although, school districts are not required to provide the optimal level of services. Carlisle Area School District v. Scott P., 62 F. 3rd 520 (3rd Cir. 1995) A program that confers only trivial or minimal benefit is not appropriate. Polk. In this case, the District has the burden of proving the appropriateness of the program it has proposed.⁴

Parents contend that the evaluation report issued by the District in March 2004 and relied upon in crafting the proposed IEP was so deficient that the resultant IEP was fatally flawed. The evaluation report is not perfect; however, based on the totality of evidence presented by the District, this contention fails.

March 2004 re-evaluation

In March 2004, when the re-evaluation occurred, Student was nearing completion of the eighth grade at the [Redacted] School and preparing to transition to high school. (FF. 6, 14) In the report, in addition to parental input, Student's current levels of performance were reported based on information provided from the head of his school as well as achievement testing. (FF. 7, 14-20) Additionally, Student's strengths and needs were recorded as well as a detailed observation from the psychologist that performed the evaluation. (FF. 14)

As part of the re-evaluative process, the District performed and OT/medical assessment and those conclusions were also incorporated into the report. (FF. 7) The results from the WISC-IV measuring Student's cognitive functioning as well as the results from a VMI were reproduced and thoroughly explained. (FF.14, 16-17) Finally, an explanation of Student's behaviors in the context of his disability was provided, justifying why the team did not perform a functional behavioral assessment. (FF. 14) Based on the re-evaluation the team rightfully recommended that Student receive specially designed small group instruction in an alternative setting in order to address deficits in written expression, reading comprehension and math. The District also recommended occupational therapy and consultation with a hearing therapist. (FF. 14) Parents were part of the team and by their signature agreed with the report. (FF. 14) Parents never expressed disagreement with the report but had the option to utilize legal avenues

⁴ Schaffer v. Weast determining that Parents bear the burden of proof in special education due process hearing was decided by the U.S. Supreme Court after this hearing commenced.

available under the IDEA to dispute the findings. They did not. Accordingly, the District issued re-evaluation report satisfies the mandates of both state and federal law. 34 C.F.R. § 300.321, 34 C.F.R §. 300.532, §300.533, 24 Pa. Code PA § 14.124.

Proffered IEP

Planning for Student's 2005-2006 academic year began the previous year while he was in the ninth grade at the [Redacted] School, a non-approved private school funded by the District. (FF.21-22) In early 2005, [Redacted] notified Parents that its school was not appropriate for Student. (FF.23, 52) Upon learning this information, the District offered a one to one assistant for Student at [Redacted] but the school declined that intervention. (FF. 24-25) For purposes of planning the 2005-2006 school year, the District contacted various other private schools about potential placement of Student. (FF-25)

During this same time frame, Parents through a permission to evaluate consented to a speech evaluation of Student. (FF.26-27) After a speech and language assessment to determine Student's strengths and needs in speech, he received speech services at the [Redacted] School for the duration of the school year. (FF. 28-30) On April 18, 2005, the IEP team met, at the [Redacted] School, in order to draft an IEP for the remainder of the 2004-2005 school year as well as the 2005-2006 school year. (FF. 31)

For the following reasons, the District has met its burden under the first prong of the Burlington-Carter analysis that it offered an appropriate program and placement to Student.

The proffered IEP satisfies the requirements under the Act. The present levels of educational performance data was based primarily on information from the re-evaluation report issued the previous year, input from the [Redacted] School as well as the recent speech intervention. (FF. 8-13, 32) Student's strengths in writing and word recognition are noted along with weaknesses in math, reading and social skills. (FF.34) From this information the team drafted an IEP containing reading, writing, math, speech and social skills goals. (FF.33-38)

Overall the reading, writing, math and social skills goals are reflective of the areas of need identified by the team and are crafted to be responsive to those identified deficits. Although some of the information in support of the

writing and math-word problem goals contain minor errors, these are readily correctable and do not rise to the level of a denial of FAPE.

Parents contend that the District's proffered IEP was inappropriate because the transition plan was incomplete. A review of the evidence in this case reveals that although Student [would soon be of transition age]; the plan although skeletal was adequate and appropriate. Under post-secondary education, it was noted that Student would meet with his counselor to explore college alternatives although no other sections were filled out. (FF. 37) The evidence has established that during discussion of transition goals, Parents expressed an interest only in college preparation as opposed to vocational goals as reflected in the plan. (FF. 37) That desire is accurately reflected in the transition plan and the testimony supporting this case. (FF. 37) Under the continuation of transition planning, "not needed at this time" was handwritten, confirming that the team considered this information; but based on Parents' desires for the pursuit of post-secondary education for their son as opposed to other alternatives, this information was not applicable.

Overall, from a programmatic standpoint, this IEP is appropriate. This Student requires academic remediation as well as supports related to social skills, the District's proffered IEP does offer such a program and is sufficiently responsive to Student's identified educational and social needs.

After the IEP meetings in April and May 2005, on referral from the District, Student and his Parents met with the [Proposed] School where Student underwent interviews and various reading and math probes, a social skills and speech and language assessments. (FF. 39-40) [Proposed] School eventually offered admission to Student. (FF. 41-42, 50) A few days later, [Private School], a residential private school accepted Student for admission. (FF.43)

On May 6, 2005, the District, through a NOREP, offered Student placement at an alternative special education setting on a day basis with speech and hearing consultation and direct speech services once a week for 40 minutes. (FF. 44-47) The [Proposed] School was not specifically named in that NOREP. (FF.46) Parents did not approve the NOREP recommending placement in a day educational setting and informed the District of their desire to have Student attend [Private School], at public expense. (FF. 46)

[Proposed] School

Under the District's current proposal, Student would receive his education, through the proffered IEP, at the [Proposed] School, an approved private school for children with special needs. (FF. 54) Under this IEP, Student would receive instruction toward his reading, writing, math and speech and social skills goals. (FF. 55) In addition to those academic areas, Student would receive speech language and hearing support. (FF. 55)

For the following reasons, the District has established its burden of proof that the proffered placement at the [Proposed] School is appropriate to meet Student's needs.

The [Proposed] School is a private school approved by the Pennsylvania Department of Education to offer education to learning disabled, socially/emotionally disturbed, autism/PDD, mentally retarded, speech/language impaired, brain damaged, physically handicapped and visually impaired students. (FF.54) [Proposed School] offers a program consistent with the recommendations of the team, Student's former school, as well as Parent's expert. All that have had involvement with Student agree that he requires an environment with small class size, paced introduction of materials, repetition, the availability of one on one assistance and the ability to practice social skills in a guided environment. (FF.13, 35, 52-53) Student has demonstrated needs in reading and [Proposed School] utilizes a research based approach to reading remediation. (FF. 55) Additionally, all teachers at the [Proposed] School are special education certified. (FF. 56) [Proposed School] has an average classroom size of six to twelve. (FF.56) Furthermore, [Proposed School] has a social skills program interwoven in the curriculum that will assist Student to meet his social skills goals. (FF. 57) Although no representative from the [Proposed] School was available to testify, thorough the testimony of others familiar with the program and the introduction of documentary evidence, the District has established the appropriateness of its program.

Student is now xx years of age and in the tenth grade. As a result, aggressive and intense attention to his after high school needs should occur. Although the transition plan was indeed skeletal, the District has established that [Proposed School] offers extensive career exploration, vocational training and post-secondary educational options that are appropriate to meet Student's needs. (FF. 52-53, 57-58) Understandably, Parents want a college

preparatory environment in order to prepare their son for possible post-secondary educational options; this too is an option at [Proposed School].

Based on the totality of evidence, the District has established that the offered program and placement are reasonably calculated to confer meaningful educational benefit to Student. Given Student's challenges, Parents understandably want their child to receive every advantage that will prepare him for adulthood. However, under the law, the District must merely offer what is appropriate, not what is optimal. The [Proposed] School is appropriate.

Having determined that the District has offered an appropriate program and placement inquiry ceases for purposes of tuition reimbursement.

ORDER

And now, this 31st day of December 2005, the Parents request for tuition reimbursement is denied.

By: *Joy W. Fleming*
Joy Waters Fleming, Esq.
Special Education Hearing Officer
December 31, 2005