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Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

22539-19-20

Child's Name

M.W.

Date of Birth

Redacted

Parent

Redacted

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

03/24/2020

Introduction

This special education due process hearing concerns the educational rights of M.W. ("student"), a student who resides in the Pittsburgh School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education to address the student's needs related to visual impairment, including blindness, and multiple disabilities. The parties disagree over the appropriate educational placement for the student.

The parent asserts that the District's proposed programming is not calculated to provide the student with a free appropriate public education ("FAPE") under IDEIA. Analogously, the parent asserts this failure is mirrored under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").³ Finally, the parent claims that the District acted with deliberate indifference toward the student's needs and, therefore, makes a claim for disability discrimination under Section 504.

Specifically, the student's parent claims that the program and placement proposed by the District, as reflected in the most-recently proposed individualized education program ("IEP"), are inappropriate to

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 ("Chapter 14").

³ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See *also* 22 PA Code §§15.1-15.11 ("Chapter 15").

meet the student's needs. The parent argues, therefore, that the student should remain in the current educational placement, a private school which specializes in educating students with blindness and other visual impairments.

The District counters that its proposed program and placement are appropriate, thereby fulfilling its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the student can be, and should be, educated in a District school, as outlined in the proposed IEP. The District also denies any allegation that it discriminated against the student on the basis of disability and, therefore, no remedy is owed therefor.

For reasons set forth below, I find that the District's program is not appropriate as offered and that the student's IEP team must convene to craft revisions to the proposed IEP.

Issues

Are the District's proposed program and placement appropriate?

If not, what revisions are necessary?

Findings of Fact

All evidence in the record, both exhibits and testimony, was considered. Specific aspects of evidence in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits specific elements of each witness's testimony are not explicitly referenced below.

1. The student has been diagnosed with a constellation of conditions, including subglottic stenosis, GERD, left-sided hemiparesis/schizencephaly, intractable epilepsy, Cortical Visual Impairment ("CVI") with horizontal nystigmus, and developmental delays. (Parent Exhibit ["P"]-3, P-6; School District ["S"]-5; Hearing Officer Exhibit ["HO"]-11).
2. As a result of these diagnoses, the student has been identified under the terms of the IDEIA as a student with a visual impairment, including blindness, and multiple disabilities. (P-6; S-5).

CVI

3. CVI is succinctly defined by the parent's expert witness:

"CVI stands for cortical visual impairment, and it is a brain-based [rather than ocular] visual impairment that affects the way the child is able to interpret visual information. In order for a child to be diagnosed with cortical visual impairment, they have to have three criteria. The first is a neurological impairment of some sort. The second is a visual exam that does not explain their visual behaviors. And the third are the characteristics -- ten behavioral characteristics have to be present."

(NT at 649, lines 4-14).

4. In the 2017-2018 school year, the student began to receive early intervention services from a private placement specializing in the education of children with visual impairments/blindness. (P-13, P-14; Notes of Testimony ["NT"] at 35-83, 285-365).).

5. The private placement utilizes an assessment instrument called the CVI Range Assessment ("CVI Range") to assess students' level of visual functioning. The CVI Range is generally accepted as a tool to assess the functioning of individuals with CVI. (P-2, P-16; NT at 285-365, 368-388, 389-434, 643-692, 700-768).
6. The CVI Range includes two rating measures. (P-1 at page 5, P-2; NT at 285-365, 368-388, 389-434, 643-692).
7. Rating I on the CVI Range measures how a trained observer gauges a student's functional visual performance. (P-2; NT at 285-365, 368-388, 389-434, 643-692, 700-768).
8. Rating II on the CVI Range measures visual resolution of various CVI characteristics across ten areas: color preferences, visual attraction to movement, visual latency, visual field preferences, difficulty with visual complexity, light-gazing, difficulty with distance viewing, atypical visual reflex responses, difficulty with visual novelty, and the absence of visually-guided reach. Each area is assessed on a scale of 0 – 1 (in quarter-point increments), yielding a Rating II score from 0 – 10. A score of 0 indicates no functional vision, a score of 10 indicates typical or near-typical functional vision. (P-1 at page 5, P-2; NT at 285-365, 368-388, 389-434, 643-692).

2017-2018

9. In November 2017, early on in the student's enrollment at the private placement in the 2017-2018 school year, the student was assessed using the CVI Range. The student scored 3.5+ on Rating I. The student scored 3.0 on Rating II. These scores indicated that the student was in Phase 1 (of 3 phases) of the CVI Range, indicating that the student had very little functional vision and was working on building visual behavior. (P-1 at page 5, P-2 at page 1; NT at 285-365).
10. In March 2018, the student's early intervention IEP team met for the annual revision of the student's IEP. (P-1).
11. The March 2018 IEP contained four goals (visual location and gaze-shift, use of an assistive technology communication device, physical therapy, occupational therapy). (P-1 at pages 12-19).
12. The March 2018 IEP provided for instruction and services as follows:
 - 26.5 hours of specialized instruction per week
 - five 15-minute sessions of nursing per week
 - twelve 30-minute sessions of physical therapy per month (approximately 3 sessions per week)
 - eight 30-minute sessions of occupational therapy per month (approximately 2 sessions per week)
 - eight 30-minute sessions of speech therapy per month (approximately 2 sessions per week)
 - 5 hours of vision services per week(P-1 at pages 20-22).

13. In the placement outlined in the March 2018 IEP, the private placement did not offer the student an opportunity to interact regularly with non-disabled peers. (P-1 at page 24).

2018-2019

14. In the 2018-2019 school year, the March 2018 IEP was in effect, and the student continued to receive early intervention services in the private placement under the terms of the IEP. (P-1; NT at 35-83, 285-365).
15. In September 2018, the student again was assessed using the CVI Range. The student scored 3.75 on Rating I. The student scored 3.5 on Rating II. These scores indicated that the student had started to move into Phase 2 (of 3 phases) of the CVI Range, indicating that the student was beginning to gain emergent functional vision. (P-2; NT at 285-365, 368-388, 643-692).
16. In January 2019, the student's early intervention evaluation report ("ER") was updated with audiology and occupational therapy assessments. (P-3).
17. In February 2019, the student's early intervention IEP team met for the annual revision of the student's IEP. (P-4).
18. The February 2019 IEP contained five goals (visual regard/gaze-shift/gaze-maintenance, visual regard and choice between complex materials, use of an assistive technology communication device, physical therapy, occupational therapy). (P-4 at pages 13-17).
19. The February 2019 IEP provided for instruction and services as follows:
 - 26.5 hours of specialized instruction per week
 - five 15-minute sessions of nursing per week

- eight 30-minute sessions of physical therapy per month (approximately 2 sessions per week)
 - eight 30-minute sessions of occupational therapy per month (approximately 2 sessions per week)
 - eight 30-minute sessions of speech therapy per month (approximately 2 sessions per week)
 - 5 hours of vision services per week
- (P-4 at pages 18-20).

20. In the placement outlined in the February 2019 IEP, the private placement did not offer the student an opportunity to interact regularly with non-disabled peers. (P-4 at page 21).
21. In March 2019, the District began to communicate with the student's mother, anticipating the student's transition to kindergarten in the District in the 2019-2020 school year. (P-5, P-12; S-9, S-11; NT at 35-83, 189-243, 444-509).
22. In late March 2019, the District sought permission to evaluate the student, permission which was granted by the parent in early April 2019. (P-5).
23. In May 2019, the District issued its re-evaluation report ("RR"). (P-6; S-5).
24. The May 2019 RR included information from the early intervention ERs, observations, input from the private placement, the September 2018 CVI Range results, an adaptive behavior assessment, as well as assessment and data from related services providers. (P-6; S-5).
25. The May 2019 RR identified the student as a student with visual impairment, including blindness, and multiple disabilities. (P-6; S-5).

26. Based on the May 2019 RR, a draft IEP was prepared. (P-7).
27. The student's IEP team met in June 2019, a meeting which resulted in an IEP which the District formally offered to the parent with a notice of recommended educational placement ("NOREP"). (P-9, P-10, P-12; S-7, S-8, S-9; NT at 35-83, 85-135, 138-187, 285-365, 444-509).
28. The June 2019 IEP contains the same five goals as in the February 2019 early intervention IEP (visual regard/gaze-shift/gaze-maintenance, visual regard and choice between complex materials, use of an assistive technology communication device, physical therapy, occupational therapy). (P-9 at pages 27-36; S-7 at 27-36).
29. The June 2019 IEP provided for instruction and services as follows:
 - orientation & mobility services 30 minutes per week
 - nursing services for daily medication administration/feeding & respiratory care
 - 6 hours of physical therapy per month
 - 4 hours of occupational therapy per month
 - 6 hours of group speech therapy per month
 - 1 hour/20 minutes of individual speech therapy per month
 - 6 hours of vision services per month(P-9 at page 40; S-7 at page 40).
30. The District's proposed placement offers an opportunity to interact with non-disabled peers. (P-9 at pages 43-44; S-7 at pages 43-44).
31. The District proposed a full-time placement in a multiple disabilities classroom at a specialized District school. (P-9, P-10; S-7, S-8; NT at 189-243).

32. In late June 2019, parent disapproved and returned the District's recommended placement. (P-10; S-8).

2019-2020

33. In August 2019, the parent filed the special education due process complaint which led to these proceedings. (HO-1).

34. With the 2019-2020 school year commencing, the parties disputed the pendency status of the student. (HO-11).

35. The parties submitted stipulations and briefs on the issue of pendency. (HO-3, HO-4, HO-5, HO-6, HO-7, HO-8, HO-9, HO-10).

36. In October 2019, the hearing officer issued a pendency ruling, finding that the student must remain at the private placement, pending the final decision in this matter. (HO-11).

Witness Credibility

All witnesses testified credibly. Heavy weight was accorded to the parent's expert witness as a result of that witness's testimony in light of the substantive evidence and her affect/demeanor during her testimony. (NT at 643-692).

Discussion

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives 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 in light of his or her individual needs, not simply *de minimis* or minimal

education progress. (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S., 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); K.D. v. Downingtown Area School District, F.3d (3d Cir. at No. 17-3605, September 18, 2018)).

Additionally, the provision of FAPE also requires that the placement of a student with a disability take into account the least restrictive environment (“LRE”) for a student. Educating a student in the LRE requires that placement of a student with disabilities be supported, to the maximum extent appropriate, in an educational setting which affords exposure to non-disabled peers. (34 C.F.R. §300.114(a)(2); 22 PA Code §711(b)(11); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)).

IDEIA: FAPE

Here, it is clear that the District can provide programming for the student at its specialized school. Teachers of the visually impaired, related services providers, nursing services, assistive technology, and other supports/accommodations which the student requires, are all available to the student for the delivery of the student’s IEP. The goals in the proposed June 2019 IEP are the same as the goals which have been effective at the private placement in allowing the student to make progress. And although the private placement and the District’s specialized school are restrictive placements serving students with low-incidence disability profiles, in terms of LRE considerations, the District’s proposed placement—with its ability to allow the student to engage with non-disabled peers—is less restrictive.

Having said all of that, the District’s proposed IEP is not reasonably calculated to yield meaningful education benefit because the proposed IEP provides no clear picture of the amount of necessary specialized instruction which the student would receive, especially in light of the programming at the private placement. The proposed IEP does not contain any indication of

the specialized instruction that the student would receive. Currently, the student receives 26.5 hours of specialized instruction per week. In the proposed IEP, it is entirely unclear how much specialized instruction the student is to receive.⁴ Therefore, the student's IEP team will be ordered to convene to determine how much specialized weekly instruction needs to be added to the student's programming.

For the reasons set forth above, the order accompanying this decision will set forth directives to the student's IEP team as that team considers revisions to the proposed IEP.

Section 504: FAPE

Section 504 and Chapter 15 also require that children with disabilities in Pennsylvania schools be provided with FAPE. (34 C.F.R. §104.33; 22 PA Code §§15.1-15.8). The provisions of IDEIA/Chapter 14 and related case law, in regards to providing FAPE, are more voluminous than those under Section 504/Chapter 15, but the standards to judge the provision of FAPE are broadly analogous; in fact, the standards may even, in most cases, be considered to be identical for claims of denial-of-FAPE. (*See generally P.P. v. West Chester Area School District*, 585 F.3d 727 (3d Cir. 2009)). Therefore, the foregoing analysis is adopted here— the proposed IEP is not reasonably calculated to yield meaningful education benefit for the reasons identified above.

⁴ This specialized instruction in the current IEP is different from the provision of vision services. Both the February 2019 IEP at the private placement and the District's proposed June 2019 IEP call for the provision of vision services (respectively, 5 hours per week and 360 minutes per month).

Section 504: Discrimination

The provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program, and was denied the benefits of the program or otherwise discriminated against on the basis of disability, has been subject to disability discrimination in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F. 3d 248 (3d Cir. 2013)). A student who claims discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in its purported acts/omissions. (S.H., *id.*).

Here, the District did not act with deliberate indifference toward the student. At all times, the District worked with the parent to propose in good faith a program and placement to address the student's needs. Certain aspects of the proposed IEP need to be revised by the student's IEP team, but the District has not acted with deliberate indifference toward the student.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, as soon as practicable but no later than 20 days after the date that the Commonwealth lifts the school-closure order, put into effect as the result of the COVID-19 pandemic, the student's IEP team shall meet to revise the student's IEP. To the extent that the student's IEP team can, and chooses to, convene during the statewide school-closure, it may do so.

The IEP team may revise the student's IEP, by mutual agreement, in any way that it deems appropriate and necessary. But the revision of the student's IEP shall include an explicit indication of the amount of time, on a

weekly basis, for specialized instruction. The amount of time for specialized instruction to be included in the student's IEP.

Furthermore, to the extent she is able and willing to participate as a member of the IEP team, the parent's expert witness shall be included as a member of the IEP team. Her participation shall be arranged telephonically, and any rate or fee for her preparation and participation shall be borne by the District at public expense. This provision is limited to no more than two meetings of the student's IEP team. Thereafter, the District is under no obligation to include the parent's expert as a part of the IEP team, although either party may independently make arrangements for her continued participation as a member of the IEP team.

The student's pendent placement shall remain at the private placement until the District proposes an appropriate IEP, or the parties agree to a NOREP-based placement.

The District has not treated the student with deliberate indifference, and there is no basis for any finding or order related to alleged disability discrimination.

Nothing in this order should be read to prohibit the parties from mutually agreeing to vary its terms of this order, so long as any such change is agreed to in writing.

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

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer
March 24, 2020