

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

## Pennsylvania Special Education Hearing Officer

### DECISION

Child's Name: MS

Date of Birth: XX-XX-XXXX

Dates of Hearing:

September 4, October 28, November 11, November 13, & December 2, 2009  
January 8, 2010

### **CLOSED HEARING**

ODR Case # 00014-09-10-LS

Parties to the Hearing:

Representative:

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Date Record Closed:

February 8, 2010

Date of Decision:

February 23, 2010

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

“Student” (“student”) is a 6-year old student residing in the Woodland Hills School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>, specifically as a child on the autism spectrum. Parents filed a complaint in July 2009, alleging that the individualized education plan (“IEP”) proposed for the student failed to provide a free appropriate public education (“FAPE”) to the student for the 2008-2009 and 2009-2010 school years. Parents requested compensatory education for those school years in addition to a hearing officer order for a private placement at a specific private school. For the reasons set forth below, the District will prevail on all of parents’ claims.

## **ISSUES**

Are the student’s IEPs proposed for the 2008-2009 and 2009-2010 school years reasonably calculated to provide a FAPE to the student?

If not, is compensatory education owed to the parents?

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<sup>1</sup> 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.

If not, is the student entitled to a due process order for a private placement at a specific private school?

### **FINDINGS OF FACT**

1. The student has been identified as a student on the autism spectrum. (Joint Exhibit ["J"]-1; Notes of Testimony<sup>2</sup> ["NT"] generally at 38, 718-757).
2. The student's developmental pediatrician, who is Board-certified in neurodevelopmental disabilities and has treated the student since 2007, describes the child as having moderate autism. (NT at 726).
3. The student exhibits expressive and receptive language disorders, anxiety disorder, sensory processing disorder, fine motor skill delays, and nutritional deficiencies/gastrointestinal issues. Cognitively, the student functions in the mild mental retardation range. (J-1; NT generally at 718-757).
4. The student attended a private preschool at the age of two, shortly before the initial diagnosis of autism. Thereafter, the student attended an early intervention program run by the local intermediate unit. (NT at 158-159).

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<sup>2</sup> The pagination of the transcript was erroneously prepared by the reporting agency. The pages are appropriately sequenced from pages 1-980 for the sessions on September 4<sup>th</sup>, October 28<sup>th</sup>, November 11<sup>th</sup>, and November 13<sup>th</sup>. The session on December 2<sup>nd</sup> is paginated out of sequence as pages 1364-1466. The final session on January 8<sup>th</sup> is paginated incorrectly out of sequence as pages 981-1348. Pages 1349-1363 do not exist in any transcript.

5. The student was evaluated in the early intervention setting in January 2008. (Parents' Exhibit ["P"]-4).
6. In April 2008, the student's mother attended a meeting regarding the transition of the student from early intervention to the District. (NT at 36-39).
7. In May 2008, the student exited from the early intervention program with the intention of enrolling in the District. (NT at 36-38, 158-159).
8. In July 2008, the student was evaluated by a school psychologist from the local intermediate unit. (J-1).
9. In August 2008, the IEP team met to consider a draft version of the IEP prepared by a District special education teacher. The teacher testified that the IEP was crafted as an initial-intake IEP to be in effect for thirty days, to be revisited after data could be collected regarding the student's progress under the IEP. (J-2; NT at 62, 1031-1032).
10. The August 2008 IEP contains:
  - appropriate present levels of performance;
  - six goals, including in the areas of attending to cues, self-direction/independence, following classroom routine, peer interaction, and receptive language;
  - specially designed instruction; and

- an indication of related service evaluations (speech and language, occupational therapy, and physical therapy).

(J-2 at pages 5-6, 11-16, 18-19).

11. There are slightly problematic aspects to the August 2008 IEP:

- the indication that the student does not have behaviors that impede the student's learning or the learning of others;
- the boilerplate nature of specially designed instruction and the support for school personnel; and
- the absence of any educational environment calculations (regular/special education settings).

(J-2 at pages 4, 18-19, 23).

12. The slight flaws in the August 2008 IEP can be attributed to the fact that it was drafted as an intake IEP. The anticipated duration is approximately 30 days, with the draft indicating that, by late September 2008, the IEP would have to be re-visited. (J-2 at page 1).

13. At that meeting, drafts of the IEP were annotated by the student's mother and an intermediate unit supervisor who attended the meeting. (J-3, J-4).

14. At the August 2008 IEP meeting, the District issued a notice of recommended educational placement ("NOREP") for a full-time

- placement in a District autism support classroom. The classroom is located in the District elementary school the student would attend if the student was not exceptional. Parents rejected the NOREP and requested mediation. (J-5).
15. Because the parties could not agree on a placement in August 2008, the student began to attend the private preschool program that the student had previously attended. The student attended the preschool program for the 2008-2009 school year. (NT at 158-159).
16. In September 2008, the parties reached a mediation agreement where the parties would collaborate on an independent evaluator to perform an independent educational evaluation at District expense. (J-6).
17. Over October and November 2008, the parties communicated regarding the selection of the independent evaluator. The nature of the communication was start-and-stop as the parties attempted to ascertain the interest/availability of various evaluators and as they caught up with each other by voicemail and by email. (School District Exhibit ["S"]-2; NT at 86-88, 512-516, 1194-1205).
18. By mid-November 2008, even though both parties were working in good faith, an evaluator had still not been selected. At that point, the District's director of special education had a health

emergency that necessitated a lengthy hospital stay. (S-2; NT at 86-88, 512-516, 1204-1205).

19. In December 2008, the parents secured an evaluation from an evaluator they had unilaterally selected. A District administrator accepted a report by an evaluator that the family had selected. (P-1, P-18; NT at 86-88, 512-516, 1205).
20. The IEP team met in February 2009. The draft IEP at that meeting was prepared by the same District special education teacher who prepared the draft IEP in August 2008. The February 2009 draft incorporated the annotations made by the student's mother and the intermediate unit supervisor at the August 2008 meeting. (J-3, J-4; P-19; NT at 1040-1041).
21. The February 2009 IEP team meeting lasted many hours. The IEP team reviewed the independent report and the draft IEP in depth. (P-18, P-19; S-4; NT at 847-850, 1174, 1223-1224, 1289-1291).
22. There was conflicting testimony about certain statements made by the District's director of special education at both the August 2008 and February 2009 IEP meetings. The statement at the August meeting was, in paraphrase, 'if you don't like what you are hearing, you can move out of the district'. The statement at the end of the February meeting was, in paraphrase, 'if you don't agree, we can go through the NOREP, and then move onto the next

step', meaning due process. (NT at 70, 104-105, 506, 525, 849-850).

23. It is an explicit finding of fact that these statements were made at the IEP meetings by the director of special education (although the exact words were not recalled and are not a matter of record). The fact that different connotations were drawn from the statements by listeners is not surprising. To the extent the statements were made, however, it is an explicit finding of fact that the statements were not made in bad faith and were not made to prejudice the relationship between the parties.
24. The parties shared the February 2009 IEP with the parents and their professionals. The parties shared back and forth various drafts of the IEPs. (S-4; J-7; NT at 526-527, 851-852, 1292-1293).
25. Over March and April 2009, the parties engaged in the IEP-sharing process, starting with the draft IEP discussed at the February 2009 meeting. The various major revisions are laid out in an exhibit that contains three types of editing: highlighted text indicates text that was added by the District as the result of the deliberations at the February meeting; light-colored text (blue in color on any color copy of the IEP) indicates text suggested by the parents for addition or amendment; and struck-through text indicates text that the parents recommend removing from the IEP. (J-7; P-24B, P-24C; NT at 143-146, 851).



26. In May 2009, the District prepared a clean draft IEP incorporating most of the revisions discussed between the parties. (J-8; P-24A).
27. The May 2009 IEP is detailed and comprehensive. It contains the following:
- an indication that the student exhibits behaviors that impedes the student's learning and the learning of others;
  - comprehensive present levels of performance;
  - fourteen goals, including in the areas of responding to cues, self-direction/independence, engagement in classroom routines, following directions, parallel play, interactive play, receptive language, letter and number identification, personal safety/personal space strategies, emotion awareness/recognition/expression, sorting, and sequencing;
  - individualized specially designed instruction;
  - an indication of related service evaluations (speech and language, occupational therapy, and physical therapy);
  - multiple levels of consultation and support for school personnel; an indication that the student qualifies for extended school year services; and
  - an educational environment calculations (regular/special educations settings).

(J-8).

28. The May 2009 IEP incorporates, for the most part, almost all of the parents' suggested textual edits. A page-by-page comparison of the IEP drafts with parents' edits and the May 2009 IEP reveals a highly precise consideration of the issues related to the student's programming. Where those edits were not incorporated, or were adapted by the District, the explanation by the intermediate unit supervisor who prepared the final form of the May 2009 IEP provided credible explanations of the differences/choice-making. (J-7, J-8; NT at 624-658, 1294-1296).

29. The special education teacher who would have taught the student at all periods relevant to these proceedings credibly testified to the physical layout of her autism support classroom, the structure of the school day for students in that classroom, the details of academic instruction and provision of related services in that classroom, and other details of what the substantive programming for the student would look like. (NT at 1043-1102).

30. In early June 2009, the District issued a NOREP for implementation of the IEP in the District's autism support classroom. Parents rejected the NOREP, indicating that they wanted to pursue due process. (J-9).

31. The parents seek an order that places the student in a private placement that specializes, to a large degree, in serving students with autism. (NT at 1371-1372).
32. The private placement provides outstanding programming for students with autism. (P-20A through P-20H, inclusive; NT at 799-818, 1370-1464).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Denial of FAPE

To assure that an eligible child receives FAPE,<sup>3</sup> an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”<sup>4</sup> “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,<sup>5</sup> not simply *de minimis* or minimal education progress.<sup>6</sup>

Moreover, both federal and Pennsylvania law, at require that the placement of a student with a disability be in the least restrictive environment (“LRE”).<sup>7</sup>

Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

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<sup>3</sup> 34 C.F.R. §300.17.

<sup>4</sup> Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>5</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

<sup>6</sup> M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

<sup>7</sup> 34 C.F.R. §§300.114-120; 22 PA Code §14.145.

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

Pursuant to 34 C.F.R. §300.116(b)(2-3), however, the notion of LRE for a student’s placement has additional contours:

“In determining the educational placement of a child with a disability...each (school district) must ensure that...the child’s placement...is based on the child’s IEP and is as close as possible to the child’s home.”

Additionally, to comply with LRE mandates, the school district must ensure that “unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.”<sup>8</sup>

Parents claim that the District has denied the student FAPE in the 2008-2009 and 2009-2010 school year. The record in this case supports the conclusion that the District has presented programming that was reasonably calculated to yield meaningful education benefit.

The August 2008 IEP is admittedly incomplete in many regards. As proposed, however, it was appropriate for the circumstances at the time it was offered. The District anticipated that the IEP was drafted only for intake purposes for a student new to the District. With an anticipated duration of only a month or so, it is clear that the District intended to convene the IEP team for what would certainly have been significant

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<sup>8</sup> 34 C.F.R. §300.116(c).

revisions. As such, at that time and having the information it had, the District acted appropriately and did not deny the student a FAPE.

The May 2009 IEP is fully appropriate. The District engaged in an authentic process to include the suggestions of the parents and to remove those portions of the draft IEP that were problematic for parents. Where there were legitimate differences between the parties, the IEP reconciled those differences in a reasoned way. In sum, the May 2009 IEP was reasonably designed to yield meaningful education benefit. The appropriate implementation of the IEP would provide the student with a FAPE.

Additionally, the program outlined in the May 2009 IEP is designed to provide a FAPE in the LRE. There is no denying the excellence of the private placement favored by parents—in many ways it is superior to the District's autism support classroom. But the standard for the District is not to match a private program available elsewhere; it is to provide a program reasonably calculated to provide meaningful education benefit. It did exactly that with the May 2009 IEP. A District-based program provided in the school where the student would attend if not exceptional is clearly a less restrictive environment. This only reinforces the finding that the program offered by the District in the May 2009 IEP.

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a

student a FAPE.<sup>9</sup> Because the District did not deny the student a FAPE in either school year, there is no compensatory education award.

#### Order for a Specific Placement

Parents request as a remedy a due process order placing the student at a specific private placement. Even though the findings above that the District did not deny the student a FAPE arguably obviate the need to make a ruling regarding this claim, this hearing officer feels it is important to make a determination on this issue.

This hearing officer is unaware of any authority to allow for an order of a specific private placement. Parents argue that they should not be forced to send their child into, should they have prevailed, an inappropriate placement.<sup>10</sup> But there is not need for such an admittedly problematic situation. In such a case, the remedy for parents is a claim for tuition reimbursement for the cost of a unilateral private placement. 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.<sup>11</sup>

Explicit in this remedy, however, is the requirement that the student be enrolled in the private placement: "(i)f the parents of a child

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<sup>9</sup> Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992).

<sup>10</sup> Parents' Closing Statement at pages 39-40.

<sup>11</sup> 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).

with a disability, who previously received education and related services under the authority of a public agency, **enroll** the child in a private (school)...a court or hearing officer may require the agency to **reimburse** the parents for the cost of that **enrollment....**" (emphasis added).<sup>12</sup> Even the recent U.S. Supreme Court decisions that found that a student need not ever receive services from a school district for parents to qualify for tuition reimbursement dealt with cases where a student was enrolled in private schools, and parents were reimbursed for the cost of that enrollment.<sup>13</sup>

Therefore, without the ability to order a prospective private placement and prospective tuition payment, and provided only the option to award reimbursement of tuition paid by parents after enrolling a student in a private placement in the face of an inappropriate program offered by a school district, this hearing officer finds that he does not have the authority to grant the remedy claimed by parents.

### **CONCLUSION**

The District has offered, through the IEPs of August 2008 and May 2009, special education programs reasonably calculated to yield meaningful education benefit to the student in the least restrictive environment. Therefore, the parents' claim for compensatory education is

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<sup>12</sup> 34 C.F.R. §300.148(c).

<sup>13</sup> Forest Grove School District v. T.A., U.S. , 129 S.C. 2484, 174 L.Ed. 2d 168 (2009); Bd. of Educ. of City of New York v. Tom F., 193 Fed. Appx. 26, 2006 WL 2335239 (2d Cir.) *aff'd without op.* 552 U.S. 1 (2007).

denied. Notwithstanding this result, a prospective private placement in a specific private school, instead of a retrospective claim for tuition reimbursement after enrollment in a private placement, is not a remedy this hearing officer is empowered to grant.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student's IEPs proposed for the 2008-2009 and 2009-2010 school years were reasonably calculated to yield meaningful education benefit in the least restrictive environment. Therefore, there is no award of compensatory education. The hearing officer has no authority to issue an order for the placement of the student in a specific private school.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

February 23, 2010