

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: DM

Date of Birth: XX-XX-XXXX

Dates of Hearing:
November 6, 2009
January 21, 28, and 29, 2010

CLOSED HEARING

ODR Cases (Consolidated)
00284-09-10-KE
00441-09-10-KE

Parties to the Hearing:

Mr. & Mrs.

Dr. Lorna Johns
Western Wayne School District
P.O. Box 500
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Date Record Closed:

Representative:

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February 22, 2010

Date of Decision:

March 9, 2010

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

“Student” (“student”) is a 21-year old student residing in the Western Wayne 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”)¹, specifically as a child on the autism spectrum.

In December 2007, the parties settled a previous round of due process with a settlement agreement that, among other things, set forth that the District would pay for one year of private school at a post-secondary facility in [Redacted state]. The student attended this post-secondary facility in, and the District paid tuition for, the 2008-2009 school year.

Parents filed a complaint in September 2009, alleging that the District owed the parents tuition reimbursement for attendance at the same post-secondary facility for the 2009-2010 school year. The District filed a counterclaim for time where the student voluntarily did not attend the post-secondary facility in that school year.

¹ 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.

Parents filed a second complaint in November 2009, alleging that the District owed compensatory education to the student for an alleged denial of a free appropriate public education (“FAPE”) from December 4, 2007 (the day after the settlement agreement was signed between the parties) through the end of the 2007-2008 school year.

Both complaints were consolidated into one hearing process, and this decision addresses the claims raised in parents’ complaints and the District’s counterclaim. For the reasons set forth below, I find that the District prevails on parents’ claims for compensatory education and tuition reimbursement, and that the parents prevail on the District’s claim for reimbursement for tuition paid on behalf of the student.

ISSUES

Does the District owe compensatory education for the period from December 4, 2007 through the end of the 2007-2008 school year?

Do the parents owe the District reimbursement for tuition related to time where the student voluntarily did not attend the post-secondary facility in the 2008-2009 school year?

Does the District owe parents tuition reimbursement for the 2009-2010 school year?

Is there the need for a pendency finding regarding the student’s current attendance at the post-secondary facility?

FINDINGS OF FACT

1. Hearings were held in a previous round of due process between the parties in May and June of 2007. The last day of the hearing was June 8, 2007. (Parents' Exhibit ["P"]-1 at page 1).
2. On June 1, 2007, one week prior to the last session of the hearing, the District issued a notice of recommended educational placement ("NOREP") indicating that the student had met all graduation requirements and, due to that fact, that the District was recommending an exit from special education. (School District Exhibit ["S"]-1).
3. On June 8, 2007, the same day as the concluding session of the due process hearing, the student participated in the District's graduation ceremony and received a diploma. (S-2; Notes of Testimony ["NT"] at 130-132, 438-439, 597-602).
4. On June 20, 2007, the hearing officer rendered a decision. (P-1).
5. The June 20, 2007 decision spoke to, among other issues, claims for compensatory education from March 2005 through the date of the decision. The decision also includes as an issue the following: "May the (District) graduate (the student) from special education if (the student) has completed (the student's) IEP goals?" (P-1 at pages 4-5).
6. Under the terms of the June 20, 2007 decision, the hearing officer awarded compensatory education and dismissed the issue regarding graduation and/or exit from special education due to a lack of evidence on the issue and the graduation issue being, in the words of the hearing officer, "hypothetical". (P-1 at page 13).
7. On June 21, 2007, the student's mother returned the NOREP, issued on June 1st in anticipation of the student's graduation, with the indication that she did not approve the recommendation to exit the student from special education. She also requested a due process hearing. (S-1).
8. Because of the parties' previous involvement in due process, the family was represented at that time by counsel, who was informed by mother of her actions. Counsel for the District was informed of parents' request for due process. (NT at 428-429, 473-476).
9. In July 2007, parents requested a re-evaluation of the student. The District issued a permission to re-evaluate and parents granted permission. (S-3, S-4).

10. The student returned to the District at the start of the 2007-2008 school year. Due to anxiety and behavioral outbursts related to being back in the school environment after graduating, the student attended for only a few days. After attending the first few days of school in the 2007-2008 school year, the student did not attend school at the District in that school year. (S-7 at page 4, S-7 at page 4; NT at 57, 158-159, 361-362, 571-572).
11. The re-evaluation report ("RR") was issued on September 12, 2007. The RR contained information about the parents' disagreement with the graduation NOREP signed by parents on June 1st. The RR listed the student's current educational program as itinerant learning support. The RR listed the student as being in 12th grade. (S-7 at page 1).
12. The next day, on September 13, 2007, the IEP team met to discuss programming for the student. There was no agreement on the IEP at that meeting. Due to mother's scheduling difficulties, the IEP team was unable to meet again. (S-8, S-9).
13. On December 3, 2007, the parties executed a settlement agreement. (P-2; S-10).
14. The settlement agreement settled all "issues raised in the Parents' due process complaint....including claims currently being litigated in any forum from the beginning of time through the date of full execution of this agreement....". (P-2 at pages 1 and 3; S-10 at pages 1 and 3).
15. Among other things, the settlement included a District covenant to pay one year of tuition at a post-secondary facility in [Redacted state]. (P-2 at page 2; S-10 at page 2).
16. Aside for the few days that the student attended the District at the outset of the 2007-2008 school year, the student did not attend any school. The student remained at home. (NT at 449).
17. In the 2008-2009 school year, the student attended the post-secondary facility in [Redacted state]. Pursuant to the settlement agreement in December 2007, the District funded this placement. (P-2; S-10; NT at 70, 229, 276, 449-450).
18. The post-secondary facility specializes in teaching independent living skills and job readiness skills to young adults on the autism spectrum. The facility is unique and, as such, both the [Redacted state] Department of Education and the [Redacted

state] Higher Education Commission have recognized that the facility does not require licensure from those bodies. (P-13; NT at 207-210, 326-328).

19. The student attended the post-secondary facility for the entire 2008-2009 school year. Due to various issues, in the spring of 2009 the student was not reacting well in the post-secondary facility, and the student returned home for a few weeks to see if there was a medical and/or mental health needs to be addressed. The student maintained contact with the facility and continued to work within the facility's curriculum. The student returned to the post-secondary facility for the last week of school and participated in school activities. At no time did the student dis-enroll from the facility in the 2008-2009 school year. (NT at 286-288, 301-303, 450-456).
20. In March 2009, while the student was back home from the facility, the student's mother requested an IEP meeting. The District responded with a request for updated information from the post-secondary facility as well as other information that mother thought might be important for review. (P-3; S-11).
21. Throughout March and April 2009, multiple IEP meetings were scheduled but cancelled at the mother's request. There were, however, informal meetings between the District, the mother, the family's advocate, and the student. (S-13; NT at 672-677).
22. In May 2009, the District requested permission to re-evaluate the student, which was granted by parents in early June 2009. (S-16, S-17).
23. The District's director of special education testified that the practice of holding IEP meetings and performing re-evaluations for students who had already graduated is not normal practice. She did so at the direction of District counsel. (NT at 77-80).
24. In June, July, and August 2009, the District prepared the RR based on its own assessments and reports it received from the family, including the report of a private psychologist. The report of the private psychologist was sent by letter dated August 8th but was not provided to the District until August 30th. (P-6, P-7; S-20; NT at 678, 680-686).
25. On August 25, 2009, parents sent a letter to the District indicating that they intended to re-enroll the student in the post-secondary facility in [Redacted state] and that they would look to

the District to fund the placement. The student returned to the facility for the 2009-2010 school year. (P-8; NT at 463-464).

26. The District's RR is dated August 31, 2009. The District attempted to schedule an IEP meeting in early September but the first date that mother offered was September 18, 2009. (P-9, P-12; S-22, S-23).
27. On September 17, 2009, the day before the IEP meeting, parents filed the complaint at 00284-09-10 seeking tuition reimbursement for the 2009-2010 school year at the post-secondary facility in [Redacted state]. (P-10; S-25).
28. On September 18, 2009, the student's IEP team met. The District issued a NOREP indicating that the student had graduated in June 2007 and that the student should exit from special education. On September 23, 2009, parents rejected the NOREP and requested a due process hearing. (P-11; S-26).
29. On September 25, 2009, the District filed an answer to the parents' complaint at 00284-09-10 denying the allegations in the complaint and asserting a counterclaim for tuition which it had paid for the 2008-2009 school year when the student had returned home from the post-secondary facility.
30. On November 2, 2009, the parents filed a complaint at 00441-09-10 seeking compensatory education for alleged denials of FAPE for the 2007-2008 school year from December 4, 2007 through the end of the school year.

DISCUSSION AND CONCLUSIONS OF LAW

Compensatory Education Claim December 4, 2007 through the end of the 2007-2008 year

To assure that an eligible child receives FAPE,² an IEP must be “reasonably calculated to yield meaningful educational or early

² 34 C.F.R. §300.17.

intervention benefit and student or child progress.”³ “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,⁴ not simply *de minimis* or minimal education progress.⁵

Moreover, both federal and Pennsylvania law, at require that the placement of a student with a disability be in the least restrictive environment (“LRE”).⁶

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

“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

³ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁴ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁵ M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

⁶ 34 C.F.R. §§300.114-120; 22 PA Code §14.145.

some other arrangement, the child is educated in the school that he or she would attend if nondisabled.”⁷

In this case, the District is in the odd position of claiming that the student graduated and so should not receive special education programming. Yet its actions entirely belie that notion. The student ostensibly graduated in June 2007, yet in July 2007 and thereafter, the District was re-evaluating the student and developing special education programming for the 2007-2008 school year. (FF 9, 10, 11, 12). Indeed, the student began the 2007-2008 school year with an IEP in development and was transported to school by the District. (FF 10, 12). On its face, then, it would appear that, notwithstanding the student’s graduation in June 2007, the District assumed the burden of providing special education programming for the student. To the extent that the student might have been denied a FAPE in that school year, compensatory education would seem to be an appropriate remedy.

But I need not reach the question of the appropriateness of the September 2007 IEP. By the time the student’s mother attended the one and only IEP meeting, the student’s actions and statements clearly indicated that, as a graduate, the student was not interested in attending school, and the student’s mother acquiesced in voluntarily not forcing the student to attend school. (FF 10, 16). Having reached the age of

⁷ 34 C.F.R. §300.116(c).

majority, the District could not consider the student a truant.⁸ In short, the student voiced objections to attending school and voluntarily chose not to attend—not for any perceived flaw in the IEP or the District’s programming but simply because the student felt he no longer belonged there. (FF 10). Neither the District nor the parents forced the issue, and so the student received no educational programming (even though the District stood ready to provide such programming to a graduate).

Compensatory education is an equitable remedy.⁹ Here, regardless of the District’s proposed IEP, it cannot be held liable for compensatory education when neither the student nor the parents felt any need, beyond the first week of the 2007-2008 school year, to pursue educational programming from the District under the terms of an IEP.

Accordingly, there will be no compensatory education award for the period from December 4, 2007 through the end of the 2007-2008 school year.

Parental Reimbursement to the District

The District claims that it should be reimbursed for tuition that it paid to the post-secondary facility for the time in spring of 2009 when the student had returned home. First, this hearing officer is unaware of any authority under federal or Pennsylvania special education law to

⁸ 22 PA Code §11.13.

⁹ 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).

order such reimbursement. The District has cited to two sources which, it argues, support its position.¹⁰ Both authorities, however, addressed school district reimbursement for medical/acute care placements and not school district requests for its own reimbursement from parents. Second and more to the point, however, is that the record clearly supports the finding that the student did not simply disengage from the curriculum at the post-secondary facility. (FF 19). The student continued to communicate with the school and work on curricular goals while at home. (FF 19). In short, there is no support in the record to support the District's counterclaim.

Accordingly, the District's request for reimbursement from the parents is denied.

Tuition Reimbursement for 2009-2010 School Year

Parents make a claim for tuition reimbursement for the 2009-2010 school year at the post-secondary facility in [Redacted state]. 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.¹¹ A substantive examination of the parents' tuition reimbursement claim proceeds under

¹⁰ In re: the Educational Assignment of M.C.T., PA Special Educ. Appeals Op. 1715; Clovis Unified Sch. Dist. v. Calif. Office of Administrative Hearings, 903 F.2d 635 (9th Cir. 1990).

¹¹ 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).

the three-step Burlington-Carter analysis, which has been incorporated implicitly in IDEIA.¹²

In this three-step analysis, the first step is an examination of the school district's proposed program/recommendation. Here, the last-offered IEP was the September 2007 IEP. (FF 12). Because the District was proposing to exit the student from special education as a result of the June 2007 graduation, there was no IEP developed as a result of the re-evaluation and IEP processes in the summer of 2009. (FF 24, 26, 28). As such, the analysis starts with whether the RR, and by extension the District's recommendation to exit the student from special education based on the student's graduation in June 2007, is appropriate. The District's re-evaluation was thorough and comprehensive. It assessed the student in myriad ways, and considered multiple sources, to see if special education and related services provided by the District were still necessary and appropriate. Input was sought from all relevant individuals. And, in sum, the conclusion of the RR that the student should be exited from special education based on the student's current functioning and post-graduation plans is fully supported by the record. (FF 24, 26, 28, 29).

When the school district's program/recommendation is found to be appropriate at step one of the Burlington-Carter analysis, the analysis

¹² 34 C.F.R. §§300.148(a),(c),(d)(3).

ends at that point, and there is no need to proceed to the second and third steps of the analysis.

Accordingly, parents are not entitled to tuition reimbursement for the 2009-2010 school year.

Pendent Placement

Because the District's recommendation that the student be exited from special education is appropriate, the issue of pendency is moot. Accordingly, this claim is dismissed.

CONCLUSION

Based on the equitable nature of compensatory education and the weight of the record regarding the acts of the student and the student's family, there is no compensatory education owed to the student for the period from December 4, 2007 through the end of the 2007-2008 school year. The District is not entitled to reimbursement from the parents for any part of the tuition paid for the private placement in the 2008-2009 school year. Because the District's recommendation that the student be exited from special education programming as of September 2009 is appropriate, the parents are not entitled to tuition reimbursement for the 2009-2010 school year. Finally, with the student appropriately exited from special education, the issue of pendency is moot.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, neither the student nor parents are entitled to a compensatory education award for any part of the 2007-2008 school year. The District is not entitled to reimbursement from parents for any tuition paid by the District on the student's behalf in the 2008-2009 school year. Parents are not entitled to tuition reimbursement for the 2009-2010 school year.

On September 18, 2009, the student was appropriately exited from special education programming at the District based on the student's graduation in June 2007 and the contents of the re-evaluation report of August 31, 2009.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

March 9, 2010