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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: MB
ODR #00514/09-10 KE

Date of Birth:
XX-XX-XXXX

Date of Hearing:
December 7, 2009

CLOSED HEARING

Parties to the Hearing:

Mr.
Ms.

Representative:

Mark Voigt, Esquire
600 West Germantown Pike
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Plymouth Meeting, Pennsylvania 19642

Chester County MH/MR Agency
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601 Westtown Road Suite 340
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Bruce Lavery, Esquire
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Interpreters:

Debi Chrisbacher, CDI
Pamela Cospers, CI/CT
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Date Transcript Received:
Date of Decision:

December 11, 2009
December 11, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.
Certified Hearing Official

Background

The two year, eight months old Child who is the subject of this hearing is deaf, and is eligible for Early Intervention services. The IFSP team has decided that the Child's Early Intervention program should be provided at the [Redacted] School for the Deaf (SCHOOL). The Parents requested this hearing, seeking a hearing officer order compelling the County to transport their Child to School.

Both parties were represented by counsel. The Child's mother, [Redacted], participated in this hearing. Therefore, in accord with the Administrative Proceedings Interpreters Act of 2006, P.L. 1538, No. 172 Cl. 02, certified interpreters participated to convey spoken English to the mother and to convey statements made by the mother into English through American Sign Language. Two of the certified interpreters were hearing and one certified interpreter was deaf.¹ At the beginning of the hearing the Hearing Officer administered an oath to the interpreters in accord with §585 of the Act.

As this hearing involved a child in the Birth to Three Early Intervention age range, it was required to be completed, including the issuance of a written decision, within 30 calendar days of November 30, 2009, the date on which the Parents' Complaint was received by the Office for Dispute Resolution. Although the transcript was due to the hearing officer on December 10th it did not arrive until December 11th. Given the Child's age and circumstances, this decision is being rendered well in advance of the date it is due.

Issue²

Must the Chester County MH/MR Agency transport the Child to the SCHOOL free of charge to the Parents three days per week until the Child's third birthday?

Findings of Fact

1. The Child is two years, eight months old and eligible for Early Intervention services.
2. The Child is deaf, [Redacted]. [NT 42-43]

¹ The Office for Dispute Resolution originally secured two hearing and two deaf interpreters for this matter. However, due to a change in start time requested by the County's counsel who had a court conflict, only three interpreters were available for the hearing. The deaf interpreter had to leave a half hour before the conclusion of the hearing session but both she and the mother noted that the hearing interpreters were fully capable of providing accurate translations. [NT 69]

² Given the urgency of the transportation issue, and the brief timelines under which this hearing had to be completed, the Parents withdrew without prejudice other issues in their complaint regarding allegations of previous denial of FAPE, with the intent to refile. [NT 66]

3. At the Parents' request the IFSP team determined that the Child's Early Intervention services would be provided at the SCHOOL. [NT 79; P-16, pages 31-32]
4. The IFSP plans are written based on [a child's] individual needs. [NT 80]
5. The SCHOOL Early Intervention program runs three days per week for three hours per day. The Child is eligible under the IDEIA [Part C] Birth to Three provisions until April 5, 2010 when the Child turns three years old, a period of less than four months. [NT 47-48]
6. Upon turning three the Child becomes eligible for the same transport to SCHOOL that the Child's older siblings receive. [P-16, page 62]
7. The County is offering to reimburse the Parents the standard mileage rate of .505 cents per mile for two 27-mile round trips per day, three days per week until the Child's third birthday. [P-16, pages 24, 36]
8. The County has said that it will not otherwise provide transportation to SCHOOL for the Child. [NT 53; P-20]
9. The County's Early Intervention Service Coordinator for MH/MR³ testified, "Transportation is not funded or provided in Chester County...Early Intervention services...are to be provided in a child's natural environment...so Early Intervention supports are provided where the children are. The interventionists travel to them." [NT 70-71]
10. The County's Early Intervention Service Coordinator testified that "There has not been a need for transportation to be funded within the past play groups that we had run". [NT 80-81]
11. The Early Intervention Service Coordinator testified that the County has no formal policy regarding transportation. [NT 80]
12. The Early Intervention Service Coordinator testified that the County made the decision that mileage reimbursement would be the limiting factor in the County's transportation program based on the County's interpretation of the definition [of transportation in the regulations]. [NT 96-97]
13. In response to an email from the mother sent on May 4, 2009 at 9:40 a.m. saying "[Child] needs SCHOOL...transportation is not possible for anyone to do for free...Suppose there is a transportation [sic] available by an agency – would you be able to pay for that?", the County informed the Parents on May 4, 2009 at 9:50

³ This witness was not asked her position at the outset of her testimony and the hearing officer did not catch that error. However, her position was entered into the record at the previous due process hearing. [P-17 page 64]

- a.m. that, “We have looked into all possibilities as far as transportation, if you know someone who is willing to transport for free that would be fine, but as far as an agency, there are none who transport”. [NT 57-58; P-20]
14. The County did not produce any documentation to the Parents or at this hearing about looking into possibilities for securing transportation for the Child. [NT 59]
 15. The Parents cannot transport the Child or travel with the Child in place of an aide. The County has no reason to doubt the truthfulness of the mother’s testimony on this point. [NT 49-51, 62, 68, 84]
 16. The County’s understanding is that the Child cannot go to SCHOOL unless the County secures a vendor to transport the Child. [NT 85]
 17. The Parents have identified at least one carrier, [Redacted carrier]⁴, that they would agree to have transport their Child to SCHOOL. [NT 25-29, 31, 85; P-17]
 18. The cost for transporting the Child to and from SCHOOL through [Redacted carrier] is approximately \$360 per day. [NT 33-34; P-17]
 19. The County became aware of [Redacted carrier]the week before Thanksgiving.⁵ [NT 85-86]
 20. The Child requires an aide during transport to and from SCHOOL, regardless of the agency providing the transportation. The cost of the aide will be in addition to the fee determined by the carrier. [NT 29-30]
 21. The Child requires a car seat for transport to and from SCHOOL. [NT 30]

Discussion and Conclusions of Law

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, for cases brought under the IDEA, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden

⁴ The Parents have the ultimate right to accept or reject a particular carrier and the Parent indicated that she was willing to have Point-to-Point transport the Child. This hearing officer declines to specify a particular carrier. [NT 37-38, 40]

⁵ The hearing officer takes judicial notice that Thanksgiving was Thursday November 26, 2009. The week before Thanksgiving was prior to the Parents’ filing their complaint on Monday, November 30, 2009.

of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. In the instant matter, the evidence was not in equipoise. The Parents, by presenting a preponderance of the evidence, prevail regarding the issue of transportation of their child to SCHOOL. The County produced no evidence that counterbalanced the Parents' evidence.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.⁶ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. Credibility of the mother and the Early Intervention Service Coordinator, the two main witnesses who testified in this matter, will be addressed below. The witness from [Redacted carrier] testified to facts as he knew them and was careful to answer exactly to the best of his knowledge. His participation in response to the subpoena issued is appreciated.

Services: Having been found eligible for special education, the Child who is the subject of this hearing is entitled by federal law under IDEIA, Part C and by state law under PA Chapter 55 §4226 to receive a free appropriate public education (FAPE) through Early Intervention Services. There is no dispute that the Child is an eligible child, and there is no dispute regarding the planned location of the Child's Early Intervention Services at SCHOOL. This dispute involves a related or supportive service, specifically transportation.

The IDEIA defines "related services" as "transportation, and such developmental, corrective and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. *See* 20 U.S.C. § 1402(26)(A)

⁶ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). *See also, Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Supportive services, such as “transportation and related costs”, are sometimes required in order for a child to receive FAPE. Echoing the July 2009 34 CFR §303.15 regarding Transportation and Related Costs [P-18, HO-1], 55 PA Code §4226.5 provides that “Transportation and related costs”, “*Includes* the expenses incurred in travel (such as mileage or *travel by taxi, common carrier, or other means* or tolls and parking expenses) that are necessary to enable an infant or toddler with a disability and the infant or toddler’s family to receive another early intervention service”. [*Emphasis added*]

34 CFR §303.15 relating to Early Intervention for Infants and Toddlers defines “include” and “including”: “As used in this part, *include* or *including* means that the items named are not all of the possible items that are covered whether like or unlike the ones named”.

Although the County is offering to reimburse the family for mileage incurred in transporting the Child to SCHOOL, it is not willing to provide transportation for the Child. The County’s sole argument that “taxi” or “common carrier” refers only to urban settings has no logical support. [NT 22, 99] In an otherwise explicit set of regulations, if Congress intended to limit the kinds of transportation to which a child is entitled according to geography, it certainly would have done so.

The mother testified credibly that the family currently does not have the resources of a working vehicle to transport the Child to SCHOOL, and the County’s witness has no reason to doubt the mother’s truthfulness. Likewise this hearing officer found the mother’s testimony to be forthright and highly credible. The County’s witness appeared quite tense and conveyed the impression that she was acting simply as the messenger rather than a policy-maker. Her testimony regarding the County’s interpretation of the meaning of “transportation” was simply not credible.

SCHOOL is the last agreed upon placement by the IFSP team.⁷ Supportive services, such as “transportation and related costs”, are sometimes required in order for a child to receive FAPE. Transportation is necessary for the Child who is the subject of this hearing to receive the early intervention service, as the Child’s Parents are not able to transport the Child. Therefore the County clearly has the obligation to provide transportation for the Child to the agreed-upon placement at SCHOOL and will be so ordered.

⁷ Even if the County should later dispute the Child’s need for the placement, SCHOOL nevertheless would remain the pendent placement, as pendency applies to an IFSP. *Pardini v Allegheny IU*, 39 IDELR 268 (3d Cir 2005)

Order

It is hereby ordered that:

1. The Chester County MH/MR Agency must transport the Child to the SCHOOL three days per week until the day of the Child's third birthday.
2. The County must fund both transportation and related costs, including those for an aide and a car seat.
3. The transportation must begin no later than 5 business days of the receipt of this Order.

December 11, 2009

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

PA Special Education Hearing Officer

NAHO Certified Hearing Official