

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

ODR No. 00603-0910AS

Child's Name: KG

Date of Birth: x/xx/xxxx

Date of Hearing: 4/14/10

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

Stephen J. Jacobson, Esquire
Connolly, Jacobson & John
188 North Main Street
Doylestown, PA 18901

School District

Pennsbury School District
134 Yardley Avenue, P.O.Box 338
Fallsington, PA 19058-0338

School District Attorney

Claudia Huot, Esq.
Wisler, Pearlstine, LLP
484 Norristown Road, Suit 100
Blue Bell, PA 19422

Date Record Closed:

April 23, 2010

Date of Decision:

May 8, 2010

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

(Student) is a ten year old resident of the Pennsbury School District (hereinafter District). Before beginning kindergarten in the District, Student had been identified as IDEA eligible by reason of an autism spectrum disorder that primarily affects language and social skills.

The dispute in this matter is centered on the legal interpretation of a settlement agreement whereby the District paid Student's tuition at a private school chosen by Parents for several years. Early in the 2009/2010 school year, Student was disenrolled from the private school by mutual agreement of the private school and Parents due to the school's inability to continue meeting Student's needs. Parents immediately sought educational services from the District, but was admittedly not offered a special education program/and placement for four months, until after the District completed a reevaluation of Student.

Parents initiated a due process complaint for compensatory education, contending that the District was required to provide a FAPE to Student upon notice that she was no longer enrolled in the private school and Parents' simultaneous request for services. The District maintains that the parties' agreement relieved it of the obligation to provide a FAPE to Student for the entire 2009/2010 school year.

With few facts in dispute, the hearing was completed in one fairly brief session, followed by submission of a written closing argument from the District as agreed by the parties. Parents elected to rely upon their opening statement, as well as the testimony and documents of record. Based upon the largely undisputed facts, the plain language of the agreement at issue and the provisions of the IDEA statute, Parents will be awarded compensatory education from October 13, 2009 until February 16, 2010, the day before Student began attending her current program.

ISSUE

Was the District required to provide Student with an appropriate special education program for the portion of the 2009/2010 school year that she was not attending the private school program for which the School District had paid tuition in lieu of FAPE pursuant to an agreement between the parties?

FINDINGS OF FACT

1. (Student) is 10 a year old child, born [Redacted]. Student is a resident of the District and is eligible for special education services. (Stipulation, N.T. pp. 10, 11)
2. Student has a current diagnosis of autism and other health impairment (OHI) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), (9); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 11)
3. Student is currently enrolled in 4th grade in an autistic support class operated by the Montgomery County Intermediate Unit (MCIU) located in another school district. (Stipulation, N.T. p. 11)
4. Student's autism disability was diagnosed at age two, and she received early intervention services before enrolling in the District for kindergarten. (N.T. p. 29)
5. Student's disabilities are manifested by impulsive, emotionally reactive behaviors and difficulties making friends, but she has had few academic problems. (N.T. pp. 29, 30)
6. After experiencing difficulties in District classroom settings during kindergarten and first grade, Student began attending a private school at the beginning of second grade pursuant to an agreement between Parents and the District.(N.T. pp. 30—33, 35, 85; S-1)
7. The agreement provided that for two school years, the District would pay Student's tuition at the private school selected by Parents "in lieu of FAPE" meaning that the family waived Student's right to receive special education and related services from the District for the 2007/2008 and 2008/2009 school years and waived the right to assert claims in an administrative or judicial forum for any alleged violations that occurred prior to execution of the agreement through the beginning of the 2009/2010 school year. (N.T. pp. 35, 37, 82, 83, 115—117; S-1)
8. Despite Parents' misgivings that the private school would be able to meet Student's needs in 4th grade, and a written request to the District to provide an educational program for Student in the next school year, a second agreement was executed by Parents and the District in June 2009 for the District to pay Student's tuition at the private school for the 2009/2010 school year under the same terms and conditions provided in the first agreement. (N.T. pp. 36—39, 83, 117—119; P-5, P-6, S-1, S-2, S-3, S-4)

9. Both agreements included a provision for repayment of tuition on a *pro rata* basis if the Student left the private school before the end of the school year and sought educational services from the District:

In the event that [STUDENT] is disenrolled from The [Private] School for any reason and the FAMILY requests the DISTRICT to provide educational services to [STUDENT] at any time during the time period from the date of this Agreement until the first day of the DISTRICT'S 2010-2011 school term, the FAMILY shall repay to the DISTRICT the amount paid by the DISTRICT pursuant to Section A of this agreement on a *pro rata* share calculated by dividing the number of days of the school year during which [STUDENT] is reenrolled in the DISTRICT and the DISTRICT is required to provide special education services to [STUDENT] BY 180.

(P-6, ¶C.1; emphasis in original; S-1)

10. Student's performance at the private school began faltering early in the 4th grade school year with work refusal and an increase in disruptive behaviors that the private school could not adequately address. (N.T. pp. 39, 103, 119)
11. By mutual agreement of Parents and the private school, Student withdrew from the private school on October 9, 2009. (N.T. pp. 39, 40, 119)
12. On the same day, Parents notified the District's director of special education that Student would no longer be attending the private school and requested educational services for Student from the District. (N.T. pp. 40, 119, 155, 176)
13. Parents were aware of and acknowledged their contractual obligation to re-pay a *pro rata* share of the tuition paid by the District if Student disenrolled from the private school and sought services from the District, and both Parent and the private school expected to comply with that provision. (N.T. pp. 40—43; P-6, ¶C.1)
14. In the October 9, 2009 telephone conversation with the director of special education, Parents were asked to put their request for services in writing, and did so by letter dated October 15, 2009, noting that a return to the classroom Student last attended in the District would not be an acceptable location for educational or other services Student was expected to receive. (N.T. pp. 43, 45—47, 87—89, 129—131, 155, 176; P-7, S-5)
15. In an e-mail dated 11/19/09, Parents reiterated the private school's willingness to refund the costs if the remaining tuition on a pro-rated basis and was awaiting notice of the date Student began receiving services from the District to calculate the amount due. (N.T. pp. 49, 57; P-7, P-9)
16. Although the October 15 letter also stated that Student was receiving "instruction in the home" from October 13 forward, Parent meant to convey that she had not elected to home school Student. (N.T. pp. 49, 50; P-7)

17. The private school had permitted Student to keep her workbooks and website access, which Parent used to build a temporary schedule around assignments Student's former classmates were completing. The private school also once sent home a test for Student to take, but otherwise provided no instruction after Student withdrew. (N.T. pp. 51—53)
18. The District neither offered nor provided services to Student after receiving notice of her leaving the private school, but issued a permission to reevaluate (PTRE) dated November 4, 2009 which Parents signed and returned on November 10. Student officially re-enrolled in the District on November 20, 2009. (N.T. pp. 48, 51, 54, 55, 59, 122, 124, 125; P-8)
19. After Parents returned the PTRE, they continued to request that the District begin providing Student with services. (N.T. pp. 61, 62)
20. The District offered to provide an hour per day of homebound instruction, but because Parent was caring for Student's dying grandmother at home during the fall of 2009, it was not feasible for Student to meet with the homebound teacher at home or to be transported by Parent to another location. (N.T. pp. 55—57, 61, 78, 123)
21. Parents received the District's reevaluation report (RR) early in January 2010. The RR confirmed Student's average to high average cognitive ability and academic achievement, as well as her need for small group instruction and for services in the areas of language, social skills and occupational therapy to address the effects of her disability in the classroom, as also identified in earlier public school and private evaluations. (N.T. pp. 63—69, 127, 162—169; P-1, P-3, P-4, P-12, p. 20)
22. The first IEP team meeting Parent was invited to attend after Student returned to the District for educational services was held on January 27, 2010. An IEP was proposed for Student, accompanied by a NOREP providing for educational and related services to be provided in a supplemental autistic support classroom operated by the Montgomery County Intermediate Unit (MCIU) and located at an elementary school in another school district. Parents approved the NOREP and Student began attending the MCIU class on February 17, 2010. (N.T. pp. 64, 69—73, 127; P-13, P-14, P-15)
23. On April 7, 2010, Parents' counsel transmitted to the District a check in the amount of \$7,232.00 as the *pro rata* reimbursement for the tuition paid on behalf of Student for the 2009/2010 school year. (N.T. p. 77; P-19)

DISCUSSION AND CONCLUSIONS OF LAW

A. Effect of the Parties' Agreement on the District's FAPE Obligation

The dispute in this matter can be reduced to the question whether the term of the agreement between Parents and School District that provided for tuition reimbursement at a

private school as a substitute for the District's legal obligation to provide a FAPE to Student (P-6, ¶B) remained in full force and effect for the entire school year, notwithstanding the circumstances and events that triggered application of the "OTHER CONDITIONS" provision found in P-6, ¶ C.1.

The District contends that for the entire 2009/2010 school year, the parties' agreement relieved it of all obligations and duties to Student that the IDEA statute and regulations would have otherwise imposed. Nevertheless, the District still contended that Parents were required to repay the *pro rata* share of the tuition the District had remitted to them for payment of the private school tuition. The District's argument is internally inconsistent and contravenes the plain language of the parties' agreement, as well as its unambiguous purpose and intent.

There is no dispute that in accordance with the parties' agreement, Student began 4th grade at the private school, but disenrolled early in October. (FF 8, 10, 11) There is also no dispute that Parents notified the District immediately, requested services and acknowledged their repayment obligation. (FF 12, 13, 15) Although the District contended at the hearing that it never considered its obligations to Student to be contingent upon first receiving the reimbursement, it still noted several times in questions posed to Parent that repayment was quite delayed. *See, e.g.*, N.T. pp.104, 105, 107.

The "OTHER CONDITIONS" provision of the parties' agreement (FF 9, P-6, ¶C.1) does not, however, impose a time limit on the reimbursement and certainly does not make repayment a condition for resuming educational services to Student. In fact, under the terms of the parties' agreement, the relationship between resumption of the District's FAPE obligation and reimbursement is the other way: Parents' request for resumption of services is necessary to trigger their repayment obligation. If the District were relieved of its FAPE obligation to Student

for the entire 2009/2010 school year regardless of the length of Student's attendance at the private school, there would be no justification for the District to seek or receive *pro rata* reimbursement of the tuition paid "in lieu of FAPE." The plain language of ¶C.1 belies the District's argument that it was entirely and irrevocably relieved of its FAPE obligation to Student for the entire 2009/2010 school year. Parents' repayment obligation was triggered only if Student both disenrolled from the private school **and** Parents requested educational services from the District. The need for both events to trigger the reimbursement obligation was emphasized in the agreement itself by underlining the word "and." (FF 9) Moreover, the method for calculating the reimbursement amount in ¶C.1 explicitly contemplates resumption of the District's FAPE obligation, providing that the *pro rata* repayment is derived from "dividing the number of days of the school year during which [STUDENT] is reenrolled in the DISTRICT **and the DISTRICT is required to provide special education services to [STUDENT] by 180.**" (FF 9, P-6, ¶C.1, emphasis added) Obviously, if the agreed substitute for the District's FAPE obligation is not viable for the entire school year, and Parents then turn to the District, expecting it to assume that obligation, the District is entitled to recover the amount it paid for the substitute services, but only to the extent it began providing those services itself. Both the explicit contractual terms and the underlying purpose of the agreement support the conclusion that if Student no longer attends the private school, the District's usual IDEA obligations to an eligible student residing within its borders resume upon Parents' request. Once the District accepts its obligation and begins providing services, Parents are required to reimburse the District for the number of school days the District provided a FAPE to Student. In short, once the "OTHER CONDITIONS" term of the agreement becomes operative, the Parents' and District's OBLIGATIONS found in ¶¶ A and B of the agreement are abrogated. (P-6, ¶¶ A, B)

Consequently, the District cannot properly refuse to provide educational services to Student to the extent the IDEA statute and the federal and state regulations require by relying upon an agreement that no longer exists as originally contemplated by the parties due to intervening events. Including ¶C.1 (FF 9) in the agreement demonstrates that the parties, in fact, contemplated that circumstances might force the Parents to seek, and the District to provide, educational services to Student, despite the parties' original expectation that Student would receive all educational services from the private school for the entire 2009/2010 school year.

B. District's Additional Reasons for Delaying Educational Services

In further defense of the delay in providing educational services to Student, the District asserted three arguments. First, the District contended that it was justified in seeking a reevaluation before beginning services. Although it was certainly an exercise of sound policy concerning an eligible Student out of the District for two years to conduct a reevaluation, that does not excuse the District from providing educational services to Student until the reevaluation was completed.

Although not directly applicable to the circumstances of this case, the IDEA statute and regulations concerning eligible students transferring from other districts or other states during the course of the school year are instructive, since this case presents an analogous situation. In accordance with 34 C.F.R. § 300.323 (e) and (f), based upon 20 U.S.C. § 1414(d)(2)(C)(i)(I), (II), a Local Educational Agency (LEA) must provide educational services to a transfer student comparable to the services s/he received from the prior LEA until an evaluation is conducted and a new IEP developed. It would be anomalous to conclude that in the case of a returning resident student, for whom a district had previously agreed to pay private school tuition in lieu of FAPE, the district has no obligation to provide services until a reevaluation is completed.

In this case, the District was well acquainted with Student's needs arising from her disability. (N.T. pp. 114, 159—161) Although the reevaluation no doubt provided important information concerning current levels of academic performance and other matters concerning Student's functioning, Student's basic needs remained unchanged. (FF 21) There is no reason the District could not have developed an interim IEP, and even an interim evaluation report, based upon a review of records, in order to begin providing special education and related services to Student almost immediately after her disenrollment from the private school and Parents' request for services.

Second, the District contended that Parents clearly did not want to return Student to her last District placement, meaning the classroom in which she last attended school in the District. The District assumes that Parents' preference not to return Student to that location constitutes a rejection of the last agreed placement, thereby relieving the District of any obligation to provide services until Parents and District agreed upon a new placement. The District, however, is confusing "placement" as contemplated by the IDEA statute with a particular classroom or location within the District. The IDEA regulations, however, define "placement" far more broadly to include:

instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and ...supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. §115(b)(1). For purposes of applying the IDEA "stay put" provision, court decisions describe "pendent placement" as the placement that as "closely as possible replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances." *VanScoy v. San Luis Coastal Unified School District*, 353 F.Supp 2d 1083 (C.D. Cal. 2005).

Parents' reluctance to return Student to the most recent classroom did not, therefore, relieve the District of the obligation to provide services a reevaluation was completed. Instead, Parents' position should have triggered an immediate identification of an IEP team for Student and an IEP meeting to identify both the type of placement that would best meet Student's needs and a location where the services associated with the program and placement could best be delivered, pending receipt of additional information from the reevaluation. That is ultimately what the District did, but only after the reevaluation was completed. (N.T. pp. 132, 133) An initial IEP team meeting to consider an interim program and placement should have included consideration of "instruction in the home" as an appropriate and reasonable means of meeting Student's immediate special education and related services needs, as well as consideration of an alternative location to which the District could have provided transportation as a related service, due to the personal circumstances of Student's family during the fall of 2009. As the District's special education director pointed out, instruction in the home is a very restrictive placement. (N.T. pp.151, 152, 175) It is, however, far less restrictive than providing no special education or related services at all for nearly four months to an indisputably eligible child with significant needs.

Finally, while maintaining the position that it had no FAPE obligation to Student at all during the entire 2009/2010 school year, the District contends that its offer of 1 hour /day of homebound services would have fulfilled any obligation the District might have had but was rejected by Parents. Unlike instruction in the home, which contemplates delivery of all services necessary to meet Student's needs in accordance with an IEP, homebound instruction is not a special education placement, as the District readily acknowledged. (N.T. p. 146) Homebound instruction, therefore, could not have satisfied the District's FAPE obligation to Student.

CONCLUSION

For the reasons explained in detail above, the June 2009 agreement between the parties relieved the District of its obligation to provide FAPE to Student in this case only until Parents disenrolled Student from the private school and sought services from the District. The District, therefore was obligated to begin providing special education and related services to Student on October 13, the first school day she was no longer attending the private school. Although the District may have needed some time to prepare even an interim program, it should have it should have reenrolled Student and begun that process on the first school day on which Student was no longer attending the private school.

Although the date from which the private school calculated the *pro rata* reimbursement of tuition to the District was not entirely clear from the evidence, the amount was presumably based upon the remaining school days beginning October 13, 2009 and ending with the last day of the 2009/2010 school year.¹ The parties' agreement contemplated that the reimbursement would be used to defray the costs of providing FAPE to Student once the private school was no longer providing the Student's education. It follows, therefore, that Student should get the benefit of educational services from the District beginning on the first day it became the District's responsibility to provide such services.

There was no evidence relating to the District's actual cost for providing FAPE to Student, including academic instruction, other educational services and the related services of speech/language and occupational therapy included in the current, agreed IEP. Consequently, there are two potential methods for calculating the amount of compensatory education to be

¹ Since the private school provided no services to Student after October 9, 2009, there would be no justification for beginning the reimbursement calculation later than October 13, 2009, regardless of the District's delay in providing FAPE. The reimbursement funds must be used for the benefit of the Student to provide compensatory services for every school day that Student was not receiving either a FAPE from the District or an education in lieu of FAPE from the private school.

awarded to Student: 1) the per school day amount of reimbursement the District received from the private school for the period from October 13, 2009 through February 16, 2010; 2) the District's per diem cost for Student's current, agreed placement in the MCIU autistic support classroom, including the cost of the related services Student is receiving pursuant to the IEP/NOREP now in effect. Since there is no evidence on which to base a cost comparison, the District will be required to calculate the per school day amount attributable to each method of calculation and Student will be awarded the greater amount to assure, to the greatest extent possible, that Parents can provide sufficient compensatory services to make up for the nearly four months of education and related services Student lost during the current school year.

In order to assure that Student will receive services necessary to compensate for those months, use of the fund to be created from the calculation of the monetary value of the compensatory education award will be prioritized to assure that Student receives tutoring or any other academic services necessary to assure that she maintains her academic strengths and if possible, begins the next school year having completed all academic subjects covered by the 4th grade curriculum and is at least at grade level in reading, writing and math when she begins 5th grade, assuming Student needs, and can handle an intensive level of additional academic instruction during the remainder of the school year and through the summer. Next, Student should receive any additional speech/language and/or OT services to put her where she would have been had she been receiving those services from the beginning of October 2009 to the middle of February 2010, again assuming her need for such services and her ability to benefit from the level of services necessary to meet that goal. Finally, any additional compensatory education funds may be used to address social/peer interaction needs.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the District School District is hereby **ORDERED** to take the following action:

Provide Student with compensatory education for every school day from October 13, 2009 through February 16, 2010 in accordance with the following standards:

1. The monetary value of the compensatory education award shall be measured by the greater of the per school day amount of reimbursement the District received from the private school for the period from October 13, 2009 through February 16, 2010 or the District's per diem cost for Student's current, agreed placement, including the cost of the related services Student is receiving pursuant to the IEP/NOREP now in effect.
2. Parents, in consultation with the other members of the IEP team, may decide how the hours of compensatory education are spent, provided that the Parents shall make the final determination in the event of disagreement between them and the School District members of the IEP team and that the following priorities shall apply:
 - a. The first consideration shall be whether Student needs and would benefit from tutoring services to assure that she begins the next school year having completed all academic subjects covered by the 4th grade curriculum and is at least at grade level in reading, writing and math when she begins 5th grade;
 - b. The next consideration shall be whether Student needs and would benefit from speech/language and/or OT services to put Student where she would have been had she been receiving those services from October 13, 2009 to February 16, 2010;
 - c. The next consideration shall be whether Student needs and would benefit from social skills training to address her difficulties with peer interactions.
3. If the foregoing specifically identified services are not needed or the IEP team determines that Student would benefit from other services, or if there are sufficient funds to provide other services after the foregoing needs are met, the compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs and/or will otherwise assist her in overcoming the effects of her disabilities.
4. The compensatory education shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the District School District through Student's IEP to assure meaningful educational progress.
5. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents. The hours of

compensatory education/fund for compensatory education services/products/devices created by this provision may be used at any time from the present to Student's 21st birthday, if necessary, but consideration should be given to identifying and providing compensatory services Student needs to prepare her for a successful 5th grade year.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

May 8, 2010