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Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

24331-2021

Child's Name

R.J.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer

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Date of Decision

05/25/2021

Introduction

This special education due process hearing concerns the educational rights of R.J. ("student"), a student who resides in the Kennett Consolidated 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 autism, attention deficit hyperactivity disorder ("ADHD"), a specific learning disability, and speech language impairment.

The student's parents claim that the District denied the student a free appropriate public education ("FAPE") through various acts and omissions related to the student's educational programming, primarily a re-evaluation process, begun in February 2020 but not completed until November 2020. The COVID-19 school shutdown in the Commonwealth of Pennsylvania took place over this time and, in August 2020, the family continued the enrollment of the student in a private placement for the 2020-2021 school year. Parents seek tuition reimbursement for the private placement undertaken by parents for the 2020-2021 school year.

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").

Analogously, parents also bring a denial-of-FAPE claim under the Rehabilitation Act of 1973, particularly Section 504 of that statute (“Section 504”).³

The District counters that at all times it met its obligations to the student under IDEIA and Section 504, pointing out, too, that the COVID-19 school shutdown played an exogenous role in the re-evaluation process for the student. Accordingly, the District argues that the parents are not entitled to any remedy.

For reasons set forth below, I find in favor of the parents.

Issues

1. Did the District provide a FAPE to the student in its handling of the February – November 2020 re-evaluation process?
2. Does the COVID-19 school closure play a role in the determination of this question?
3. If the student was denied FAPE, are parents entitled to a tuition reimbursement remedy?

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”).

Findings of Fact

All evidence in the record, both exhibits and testimony, was considered.

Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

Prior Educational History

1. Until 2017, the student resided in a neighboring state and attended, since kindergarten, the private placement for which parents seek tuition reimbursement. (Notes of Testimony ["NT"] at 53-121).
2. In February 2015, the student underwent a private neuropsychological evaluation to "aid in the planning of educational and therapeutic interventions". (Parents Exhibit ["P"]-1).
3. The private evaluation identified the student as having multiple psychological diagnoses that might impact the student in the educational environment, including a specific learning disability in reading, a speech disorder (articulation), autism spectrum disorder (mild), anxiety disorder, and attention deficit hyperactivity disorder ("ADHD"). (P-1).

2017-2018 / 5th Grade

4. Just prior to the start of the 2017-2018 school year, the student's family moved into the District. (School District Exhibit ["S"]-5; NT at 53-121).
5. In August 2017, the District requested permission to evaluate the student. (S-3).
6. In October 2017, the District issued its evaluation report ("ER"). (S-5).

7. The October 2017 ER included a record review with diagnoses and results from various providers, including information from an evaluation by the student's out-of-state school district in 2014 and significant content from the February 2015 neuropsychological report. (P-1; S-5).
8. The October 2017 ER included input from parents and teachers, as well as multiple years of the student's academic records from the private placement. (S-5).
9. The District evaluator performed one observation of the student at the private placement. (S-5).
10. The October 2017 ER contained attention and behavior rating scales completed by the student's parents and teachers from the private placement. (S-5).
11. The District evaluator supplied social-responsiveness rating scales which were not returned by teachers and were only partially completed by parents. (S-5).
12. Parents reported that the student was in an emotionally dis-regulated state in the fall of 2017 and requested that additional assessment, such as cognitive or academic testing, not take place. The District acquiesced in that request. (S-5).
13. The October 2017 ER identified the student as a student with a health impairment (ADHD), specific learning disability (unspecified but with identified academic needs in reading and writing), autism, and speech language impairment. (S-5).
14. In November 2017, the student's individualized education program ("IEP") team met to discuss the student's programming, and the District proposed the initiation of special education at the District. (S-6, S-7).⁴
15. The District recommended a District-based program and placement. Parents disapproved the recommendation and requested mediation. (S-6, S-7).

⁴ Attachments to the notice of recommended educational placement ("NOREP") returned by the parents included a letter setting forth parents' disagreement with the NOREP. The NOREP and this letter references an IEP, although a November 2017 IEP was not made part of the record. (S-7).

16. The District dis-enrolled the student, and the student remained at the private placement at parents' expense. (NT at 53-121).

2018-2019 / 6th Grade

17. The student remained at the private placement for the 2018-2019 school year. (S-8).

2019-2020 / 7th Grade

18. In the fall of 2019, the student's dis-regulation led to a partial hospitalization program. (P-3; NT at 53-121, 303-362).
19. In November 2019, in exploring options for educating the student, the parents contacted the District and re-enrolled the student in order to engage in a re-evaluation process. A District special education administrator testified that the student's enrollment status impacted events over the 2019-2020 and 2020-2021 school years. The student's mother testified that the family undertook the re-enrollment process in the fall of 2019, resisted later District attempts at dis-enrollment, and that the family continues to receive communications and updates as it would for any enrolled student in the District. The testimony of the student's mother is credited. (P-3; NT at 303-362, 373-380).
20. The District school psychologist was aware that the student was being discharged from a partial hospitalization program and was aware that the parents were seeking re-enrollment of the student in the District but was unaware that the parents were seeking to have the student re-evaluated by the District. (P-3; NT at 135-227).
21. The District school psychologist testified that she felt the District should wait to pursue a re-evaluation, even perhaps until October 2020 when the student was due for a minimum triennial re-evaluation based on the October 2017 ER. (NT at 135-227).
22. No one at the District sought permission to re-evaluate the student, although input and data began to be gathered over September – October 2019 that ultimately became part of the

District's April 2020 re-evaluation report ("RR"). (S-15 at pages 2-3; NT at 53-121, 135-227, 303-362).

23. In February 2020, the District formally sought permission to re-evaluate the student. (S-11).
24. At the same time, in February 2019, the District issued what it called a "100-day IEP" for the implementation of services pending completion of the re-evaluation. (S-10, S-12).
25. As part of the re-evaluation process, the District communicated with the private placement to have teachers complete ratings scales and provide input. (S-13).
26. Parents also provided input and provided a release for the District to speak with representatives of the partial hospitalization program about the student's treatment and discharge from the program. There was testimony from the District school psychologist that parental input was not received until July 2020. The student's mother testified that those documents had been returned in the mail at the time of the evaluation. The testimony of the student's mother is credited. (NT at 135-227, 373-380).
27. Achievement testing in reading, writing, and mathematics was conducted by the District school psychologist in the first week of March 2020. Behavior and social-responsiveness assessments were also conducted in early March. (S-15, S-18).
28. On March 13, 2020, as a result of the COVID-19 pandemic, schools in the Commonwealth of Pennsylvania were closed by order of the governor, a closure which ultimately led school buildings being closed throughout the Commonwealth for the remainder of the 2019-2020 school year.
29. In mid-April 2020, the District informed the parents that the re-evaluation could not be completed due to pandemic-related conditions and that "until school resumes. At that time, evaluators will proceed with conducting the re-evaluation." (S-14; 135-227).

30. The aspects of the re-evaluation process that could not be completed included in-class observation, occupational therapy, and physical therapy assessments. An observational functional behavior assessment could also not be performed. (S-15 generally, and at pages 28, 34-35).
31. Along with the incomplete April 2020 RR, the District issued a NOREP indicating that it would complete the re-evaluation “when the Governor allows schools to reconvene”. (S-16).
32. Parents disapproved the NOREP, indicating that they wished to have the re-evaluation completed using virtual means. (S-16).
33. The parents realized in July 2020 that the District had not included their ratings scales submitted by mail in the spring, so they re-submitted the ratings scales and other documentation requested at that time. Beyond this exchange, the parties did not communicate in the summer of 2020. (NT at 53-121, 373-380).

2020-2021 / 8th Grade

34. In late August 2020, the parents contacted the principal of the District middle school where the student would have attended, providing notice that the parents did not feel the District had an appropriate program/placement for the student for the upcoming 2020-2021 school year, that the student would be returning to the private placement, and that the parents would be seeking tuition support from the District as a result of the private placement. There was no response from the District. (S-17; NT at 53-121).
35. The student returned to the private placement for the 2020-2021 school year. (P-6; NT at 53-121, 235-292).
36. The private placement began school on September 9, 2021 with 100% live instruction. (NT at 235-292).
37. The private placement is a special education school, serving students with a variety of academic, social, and behavioral needs. (NT at 235-292).

38. The student's program at the private placement includes academic coursework in reading, English, science, social studies, and mathematics. (P-2, P-6; NT at 235-292).
39. The student receives individualized support from a reading specialist, a language specialist, an occupational therapist, as well as the support of a psychologist on staff at the placement. (P-2, P-6; NT at 53-121, 235-292).
40. On this record, the student's grades were mostly As, and the student's teachers and specialized providers reflected progress in the 2020-2021 school year. (P-6).
41. The District began school on September 8, 2020 with 100% virtual instruction, returning to live instruction in January 2021. (NT at 303-362).
42. In September 2020, the family attempted to work with the occupational therapist for the occupational therapy evaluation, but the student was non-compliant and could not be made available for the evaluation. Ultimately, the occupational therapy assessment was conducted virtually. (P-4).
43. In November 2020, the speech and language therapist attempted to work with the student, but the student was non-compliant and could not be made available for the evaluation. Ultimately, the speech and language assessment was conducted virtually. (NT at 135-227, 303-362).
44. In November 2020, the District issued its RR, concluding that the student continued to be eligible for special education as a student with autism, ADHD, a specific learning disabilities in reading and written expression, and speech language impairment. (S-18; NT at 135-227).
45. In early December 2020, the District proposed an IEP for the student. (S-19, S-20).⁵

⁵ These documents are included here to complete the factual picture for the record. As set forth below, the IEP is not relevant to the inquiry because parents, despite requesting this type of information as to programming and placement for months—even prior to the COVID-19 school closure—were not placed in a position to make this part of their decision-making when they returned the student to the private placement in early September 2020. See also, NT at 33-37 (hearing officer remarks regarding December 2020 IEP as evidence).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

IDEIA/Denial-of-FAPE

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); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

The critical first step in crafting a special education program is having a comprehensive evaluation of the student to understand the student's strengths and needs, including potentially highly specialized needs, from a

variety of perspectives (parents, teachers, specialized providers and/or evaluators) and data-gathering/assessments. (34 C.F.R. §§300.301-300.311; 22 PA Code §§14.123-14.125). Once a student with a disability has been found eligible for services under IDEIA through an initial evaluation, that student must be re-evaluated, at a minimum, every three years thereafter. (34 C.F.R. §§300.303(b)(2)). "If (a school district) determines that the educational or related services needs...of the child warrant a re-evaluation", or "if the child's parent requests a re-evaluation", a school district must undertake a re-evaluation. (34 C.F.R. §§300.303(a)).

In this matter, the District knew in November 2019 that the student was in a partial hospitalization program and that, given the significant needs that were emerging around that situation, the parents were unsure of what the student's needs would be, what schooling might look like, and where all of that might take place. Indeed, the email exchanges with District personnel at that time clearly indicate that the family was looking to the District given the student's needs and put together a program and placement for consideration, and the special education administration even responded "as you know, (we are) already collecting data for (the) triennial re-evaluation" (P-3 at page 1). This is not accurate, as the triennial re-evaluation would not have been required until October 2020. Still, it shows that the wheels were in motion at the District for the explicit need to re-evaluate the student.

At that point, then, the District recognized that a re-evaluation was moving forward, especially in light of what the parents were sharing with the District about the student's dis-regulated state, yet it took no action— most simply and directly, it did not request permission to re-evaluate (with or without its NOREP-based "100 day" IEP template). This is clearly a case where the District knew, or should have known, that it should have requested permission to re-evaluate the student in November 2019. Inexplicably, the District waited three months, until February 2020, to request permission to re-evaluate the student.

As any reader of this decision knows, the COVID-19 pandemic overtook matters (and overtook the entire world) shortly thereafter. But it is clear that the District failed in its obligations to provide the student with FAPE well before this point in time, by not re-evaluating the student when it explicitly recognized the need to do so in the fall of 2019.

COVID-19 School Closure. In conceptualizing the issues in this matter, and as presented through opening statements, the impact of the COVID-19 school closure as of mid-March 2020 appeared to be part of the decisional matrix. The parties through counsel, understandably, looked at the chronology of events and the various documents and communications that flowed back and forth over the spring of 2020 and into the fall of 2020 and conceived of the issue in light of the school closure. This hearing officer, too, thought that the March 2020 school closure might impact how evidence

should come into the record and how it might be weighed. Looking at the record in its entirety in light of the controlling law, however, the evidentiary fulcrum turns out not be the school closure and its impact on the re-evaluation process, but the events of the fall of 2019, well before the onset of the pandemic.

Tuition Reimbursement. 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 (Florence County District Four v. Carter, 510 U.S.7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also* 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program, or last-operative program, and whether it was reasonably calculated to yield meaningful education benefit. Step two of the Burlington-Carter analysis involves assessing the appropriateness of the private placement selected by the parents. At step three of the Burlington-Carter analysis, the equities must be balanced between the parties.

At step one of the Burlington-Carter analysis, here the District failed in its obligation, in light of the events and communications in the fall of 2019, to undertake a re-evaluation process as of, say, December 1, 2019.⁶ Therefore, the re-evaluation should have been completed by January 30, 2020⁷, with an IEP process underway thereafter. Thus, at some point in February 2020, the District should have been in a position to inform parents of the programming and placement it felt was appropriate for the student. This is the crux of the denial of FAPE—by failing to timely re-evaluate the student when it recognized a need to re-evaluate, the District failed to meet its statutory (let alone substantive) requirements to put into the parents’ hands the necessary information they needed to make education-programming decisions for the student.

Step two of the Burlington-Carter analysis requires that a unilateral private placement be appropriate in meeting the special education needs of a student. Here, the record is abundantly clear that the private placement is appropriate. The student receives specialized instruction and supports in all areas of need and made progress throughout the student’s time at the placement. The parents have carried their burden of proof at step two of the analysis.

⁶ The parties exchanged emails about the partial hospitalization and the re-evaluation process in mid-November. Given the necessary back-and-forth in requesting/receiving permission to re-evaluate, and the intervening Thanksgiving holiday, it seems reasonable for everything to be in place for a re-evaluation to commence by December 1, 2019.

⁷ 60 calendar days to complete the re-evaluation. (22 PA Code §14.124(b)).

To comprehensively address the Burlington-Carter analysis, at step three of the Burlington-Carter analysis, the equities do not weigh decidedly in favor, or against, either of the parties.

Accordingly, the District denied the student FAPE by not having in place by the end of February 2020 a completed re-evaluation and IEP for consideration by the student's parents and IEP team. With the parents' unilateral private placement wholly appropriate for the student and no equitable consideration standing in the way, parents will be awarded tuition reimbursement.

Section 504/Denial-of-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).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)).

⁸ Pennsylvania's Chapter 14, at 22 PA Code §14.101, utilizes the term "student with a disability" for a student who qualifies under IDEIA/Chapter 14. Chapter 15, at 22 PA Code §15.2, utilizes the term "protected handicapped student" for a student who qualifies under Section 504/Chapter 15. For clarity and consistency in the decision, the term "student with a disability" will be used in the discussion of both statutory/regulatory frameworks.

Therefore, the foregoing analysis is adopted here— the District denied the student FAPE, the parents’ unilateral private placement is appropriate, and there is no equitable barrier to remedy.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, parents are entitled to tuition reimbursement from the Kennett Consolidated School District for the student’s private school tuition for the 2020-2021 school year.

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

05/25/2021