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Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: A.B.

Date of Birth: [redacted]

Dates of Hearing:

September 15, September 16, November 9, November 30, 2009  
January 20, 2010

### **CLOSED HEARING**

ODR Case # 10036-08-09-KE

Parties to the Hearing:

Parent[s]

Dr. Ron VanLangeveld  
Wallingford-Swarthmore School District  
101 Plush Mill Road  
Wallingford, PA 19086

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Donald Litman, Esq.  
P.O. Box 35  
Lansdale, PA 19446

Timothy Gilsbach, Esq.  
10 Sentry Parkway  
Suite 200  
P.O. Box 3001  
Blue Bell, PA 19422

February 5, 2010

February 20, 2010

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a teen-aged student residing in the Wallingford-Swarthmore 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>, namely as a student with an emotional disturbance, a specific learning disability, and attention deficit hyperactivity disorder (“ADHD”). Parents filed a complaint in May 2009, alleging that the student’s special education program failed to provide a free appropriate public education (“FAPE”) to the student for the 2007-2008, 2008-2009, and 2009-2010 school years. Parents requested compensatory education for those school years in addition to a claim for tuition reimbursement for a unilateral private placement made by the parents for extended school year (“ESY”) services in summer 2009. Additionally, parents made a request for an independent educational evaluation (“IEE”) and for the reimbursement of the services of an educational consultant. For the reasons set forth below, the parents will prevail on the claims for the denial of FAPE, tuition reimbursement, and the IEE but will not prevail on the claim for reimbursement for the educational consultant.

### **ISSUE**

Since May 11, 2007, has the student been denied a FAPE? If so, is compensatory education owed to the student?

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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.

Are parents entitled to tuition reimbursement for privately-paid programming for the student in summer 2009?

Must the District fund an IEE?

Are parents entitled to reimbursement for the services of an educational consultant?

### **FINDINGS OF FACT**

1. The student has been identified as a student with an emotional disturbance, a specific learning disability, and ADHD. The student's initial identification was made in March 2007 while the student was in 6<sup>th</sup> grade. (Parents' Exhibit ("P")-5, P-6; School District Exhibit ("S")-3).
2. The student's individualized education plan ("IEP") of March 2007 indicated that the student's behavior did not impede the student's learning or the learning of others. The March 2007 IEP included goals in math, organization skills, time management, on-task behavior and task-completion skills. The IEP also included counseling for 30 minutes per week as a related service but only to address age-appropriate socialization skills. (S-4).
3. At some point in February or March 2007, the student had an altercation with a parent, with whom the student does not live. The altercation resulted in an investigation by children and youth services that suspended in-home visits with the parent on weekends but did not result in barring contact with the parent. The parent has regular contact with the student and visits the student in the student's home. (NT at 288-290, 319-321).
4. The recommended educational placement ("NOREP") for the March 2007 IEP was issued at some point prior to June 2007 but was not returned. The NOREP was re-issued by the District in June 2007 and was finally signed and returned by one of the student's parents in August 2007. (S-6).
5. In 7<sup>th</sup> grade, the 2007-2008 school year, the student began to exhibit problematic behaviors. The student would engage in "shutdown" behaviors in school such as not doing classwork and putting student's head down through class time. The student's behaviors were discussed

- by the student's special education teacher and one of the student's parents. (Notes of Testimony ["NT"] at 774-776, 785-786).
6. Over the course of 7<sup>th</sup> grade, the student was involved in outpatient treatment at a mental health clinic and two inpatient stays at mental health clinics. (P-1; S-11 at page 6).
  7. In October 2007 and March 2008, the student was involved in out-of-school incidents that resulted in police reports. (P-14).
  8. The student made uneven progress on the goals in the March 2007 IEP. As the 2007-2008 school year unfolded, the student's progress on organization skills, time management, on-task behavior and task-completion behavior were marginal. Academically, the student was achieving Bs and Cs except for mathematics where the student achieved Ds. (P-3; S-11).
  9. The student's guidance counselor, who worked with the student in 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> grades, testified that the student exhibited academic and emotional deterioration through 7<sup>th</sup> grade. The school psychologist assigned to the school where the student attended would see the student as often as 3-4 times per week during 7<sup>th</sup> grade. (NT at 553-554, 807-808).
  10. In April 2008, the student's IEP team met for its annual review of the student's IEP. (S-11).
  11. The April 2008 IEP indicates that the student now exhibited behaviors that interfered with the student's learning and the learning of others. (S-11).
  12. The April 2008 IEP included goals in math, writing, organization, task completion, and behavior (specifically responding to teacher directives). The student's behavior improvement plan used a daily points plan to address assignment-completion, response to teacher directives, and engagement in class activities. The student continued to receive 30 minutes of counseling per week; the limited focus on age-appropriate socialization skills, however, was removed. (S-11).
  13. There is no record that the District issued a NOREP for the implementation of the April 2008 IEP. (NT at 99-100).
  14. At some time toward the end of 7<sup>th</sup> grade, the 2007-2008 school year, one of the student's parents requested a re-evaluation of the student. (P-6).

15. In mid-August 2008, shortly before 8<sup>th</sup> grade began, the student was involved in an out-of-school incident that resulted in a police report. The student was involved in another out-of-school incident that involved a police report in September 2008. (P-14).
16. The District issued a re-evaluation report in September 2008. The student continued to be identified as a student with ADHD. The student was also identified as a student with an emotional disturbance. The student's identification as a student with a specific learning disability was not listed in the re-evaluation report. (P-6).
17. The IEP team was not convened to discuss the new identification of emotional disturbance or to revise the student's IEP given the new identification.
18. In the fall of 2008, the student's behavior continued to deteriorate in 8<sup>th</sup> grade. In October 2008, the student was given four days of suspension for three incidents of misbehavior. (P-13).
19. On Saturday, November 15 and Sunday, November 16, 2008, the student was involved in two out-of-school incidents that resulted in police reports. (P-14).
20. On November 19, 2008, one of the student's parents was contacted twice by the District school psychologist, asking the parent to retrieve the student from school and take the student to a crisis center. The school psychologist indicated that the student had been spending inordinate amounts of time in her office, cutting class, exhibiting avoidance behavior, and refusing to do schoolwork. (P-19, P-20).
21. From November 21 to December 2, 2008, the student went into an inpatient mental health hospitalization. From December 3 to December 10, 2008, the student stepped down to an outpatient mental health unit. (P-2).
22. On December 2, 2008, while the student was in the inpatient mental health setting, the student's IEP was unilaterally changed by the District without an IEP meeting. Some goals from the April 2008 IEP were retained, and others were revised. The level of counseling services was raised to 60 minutes per week. (P-4, P-27).
23. The IEP team did not meet upon the student's return to school on December 11, 2008. (P-22).

24. On February 9, 2009, one of the student's parents requested an IEP team meeting after a discussion with the District school psychologist revealed that the student's in-school behavior had not improved. (P-23).
25. The IEP team met on March 6, 2009 and considered the unilateral December 2009 IEP. The IEP did not indicate that the student had behaviors that impede the student's learning or the learning of others, although it did include a behavior intervention plan. The IEP also indicated that the student would attend ESY programming at the District in summer 2009. (P-27).
26. There is no record that the District issued a NOREP for the implementation of the April 2008 IEP. (NT at 99-100).
27. On April 28, 2009, the District issued a NOREP regarding the student's ESY programming for summer 2009 at the District over June and July 2009. Parents rejected the NOREP, requesting an expedited due process hearing to consider the ESY issue. (S-17).
28. On May 11, 2009, the parents filed their complaint with issues related to both the ESY programming in summer 2009 and the other allegations that form the basis of the dispute at this file number.<sup>2</sup>
29. In late May 2009, the parties met at a resolution meeting to discuss the ESY program for summer 2009. (NT at 738-739).
30. At the resolution meeting, the parties agreed to fund parents' private placement for the student for ESY programming in summer 2009. In June 2009, the District indicated that it would not fund the private placement. The decision was made entirely on the basis of cost without regard to the educational programming. The District superintendent indicated that the District representative at the resolution meeting—the District's director of special education—did not have the authority to make representations on behalf of the District at that meeting, that only the District school board could make such representations. No one from the school board attended the resolution meeting, and the settlement reached at the resolution meeting was not presented to the school board for approval. (NT at 704-707, 713-719, 738-754, 916-918).
31. The decision not to fund the private placement was made by the District superintendent following a meeting involving the superintendent and the director of special education. (S-37).

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<sup>2</sup> The District filed a sufficiency challenge which was granted, and on July 6, 2010, as ordered, the parents filed an amended complaint.

32. The student attended the private placement at parents' expense. (NT at 132).
33. In May and June 2009, the District gathered information for a functional behavior assessment ("FBA"). The information-gathering for the FBA was prepared as part of a school-based practicum experience by an individual interning at the District as part of a doctoral studies program. The FBA was reviewed by the school psychologist. The information-gathering form is dated June 9, 2009 but was not shared with the student's parent until fall 2009. The District never issued a FBA based on its information-gathering. (S-42; NT at 829-837, 842-844, 847-851).
34. The student's guidance counselor, who worked with the student in 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> grades, testified that the student exhibited academic and emotional deterioration through 8<sup>th</sup> grade. The school psychologist assigned to the school where the student attended would see the student as often as 3-4 times per week during 8<sup>th</sup> grade. (NT at 553-554, 807-808).

### **DISCUSSION AND CONCLUSIONS OF LAW**

Again, the parents have claimed (1) that compensatory education is owed for alleged deprivations of FAPE in the 2007-2008, 2008-2009, and 2009-2010 school years, (2) that the parents are entitled to tuition reimbursement for ESY programming in summer 2009, (3) that the parents are entitled to an IEE, and (4) that the parents are entitled to reimbursement for the services of an educational consultant. Each of these claims will be examined separately.

#### **Denial of FAPE**

Parents claim that the District has denied the student FAPE in the 2007-2008, 2008-2009, and 2009-2010 school years. 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>

In this case, the student has been terribly mis-served by the District since September 2008. The student’s academic performance and behavior was declining through 7<sup>th</sup> grade, the 2007-2008 school year, but this decline did not amount to a denial of a FAPE. (FF 2, 4, 5, 6, 7, 8, 9 10, 11, 12). But everyone involved deeply with the student recognized that, even then, behavior was an emerging issue in the student’s educational program. (FF 5, 6, 7, 9, 14).

By September 2008, the District had identified the student as having an emotional disturbance. (FF 16). Yet the District did nothing to address the student’s educational programming; there was no data-gathering and no IEP team meeting. (FF 17).

At that point, the gradual decline in the student’s behavior accelerated through October and November 2008, culminating, in the eyes of the District school psychologist, in an in-school crisis situation and, ultimately, in the student’s hospitalization. (FF 18, 19, 20, 21).

Again, however, the District took no action outside of unilaterally changing the student’s IEP while the student was hospitalized. (FF 22, 23). The

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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).



District did not gather data for a FBA until May 2009 and, at least as of the time that this record was developed, the student still did not have a FBA. (FF 32).

The District's re-evaluation report was issued on September 25, 2008. (FF 16). Therefore, within twenty school days, or approximately October 15, 2008, the IEP team should have met, and a revised, appropriate IEP accounting for the student's behavioral needs should have been implemented.<sup>7</sup>

Added to this history of a substantive denial of a FAPE, the District's procedural errors are gross in nature and amount to a denial of a FAPE as well. As of the time that this record was developed, the District last issued a NOREP for the student's substantive IEP (i.e., outside NOREPs for ESY programming in summer 2009) in June 2007. (FF 4, 13, 27, 28). The NOREP is the document which frames the stance between the District and the parents—agreement with the NOREP means the IEP has been approved and will be implemented as indicated; disagreement with the NOREP means that the parties must seek mediation, due process, or some other dispute resolution mechanism; ignoring the NOREP means that the school district must seek to validate the educational placement it is offering. All of this is critical to ascertaining a student's educational program and placement. And, again, the District unilaterally changed the student's IEP in December 2008 while the student was hospitalized. (FF 22).

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<sup>7</sup> 22 PA Code §§14.124(d), 14.131(a)(6).

In sum, then, since October 15, 2008, the District has engaged in substantive and procedural acts and omissions that arise to a denial of a FAPE. Therefore, as a result of this deprivation, there will be an award of compensatory education.

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE.<sup>8</sup> The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE.<sup>9</sup> The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE “is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.”<sup>10</sup>

Here, I find that the District’s failures amounted to a failure of the student’s educational programming from October 25, 2008 through the date of this decision. Indeed, the student presents with deep, complex, and behaviorally problematic issues which were in evidence since 7<sup>th</sup> grade. (FF 5, 6, 7, 8, 9, 15, 16, 18, 19, 20, 21, 22, 34, 35). The student still does not have an IEP that is responsive to the student’s needs for emotional support. (FF 12, 16, 17, 34).

The student will be awarded 5.5 hours of compensatory education for every school day from October 15, 2008 through the end of the 2008-2009

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<sup>8</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>9</sup> Ridgewood; M.C..

<sup>10</sup> M.C. at 397.

school year and the 2009-2010 school year until the date of the IEP team meeting where the District proposes an appropriate IEP .<sup>11</sup>

As for the nature of the compensatory education award, the parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

An award of compensatory education will be fashioned accordingly.

### Tuition Reimbursement

Parents claim tuition reimbursement for the cost of the private placement for the student's ESY programming in summer 2009. Long-standing case law and the IDEIA provide for the potential for private school tuition

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<sup>11</sup> The figure is based on the Commonwealth's minimum school day requirements for 7<sup>th</sup>-12<sup>th</sup> graders. 22 PA Code §11.3.

reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability.<sup>12</sup> A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated implicitly in IDEIA.<sup>13</sup>

In this three-step analysis, the first step is an examination of the school district's proposed program. The second step is an examination of the parents' private placement. Here, the District agreed to the private placement selected by the parents. (FF 30, 31, 32). As such, the District's actions satisfy both steps one and two of the Burlington-Carter analysis. Because the District argues that it never agreed to the private placement, it is necessary to engage in the third step of the Burlington-Carter analysis, the so-called "balancing of the equities" step. The third step is to determine if tuition reimbursement is a fair remedy and, if so, in what amount, by examining the actions of the parties. In this case, I find that the parents should be compensated for the full amount of their tuition reimbursement claim.

The District fails to understand the resolution meeting process. A resolution meeting is meant to encourage the parties to meet to see if the dispute can be resolved without the need for a hearing. Toward that end, "the (school district) must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that includes *a representative of the*

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<sup>12</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).

<sup>13</sup> 34 C.F.R. §§300.148(a),(c),(d)(3).

*public agency who has decision-making authority on behalf of that (school district)....”* (emphasis added).<sup>14</sup> Everyone from the District who testified about the resolution meeting where summer 2009 ESY programming was discussed agreed that the District’s director of special education attended that meeting without the authority to resolve the parents’ claim for a private placement. (FF 31). This is clearly what the resolution process is mandated to avoid—a meeting where a dispute cannot be fully and finally resolved. It seems clear that everyone left the resolution meeting in May 2009 with an understanding that the parents’ private placement for the student’s summer 2009 ESY programming and that the decision not to place the child there was made by District administration based solely on cost. (FF 31, 32). Therefore, the equities clearly favor the parents.

Accordingly, the parents are entitled to tuition reimbursement for the private placement of the student for summer 2009 ESY programming.

### IEE

Parents claim that the District should fund an IEE. Based on the entirety of the record, but especially the District’s handling of the student’s needs for emotional support and behavioral support, this hearing officer feels that the parents are entitled to an IEE that will more comprehensively inform the

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<sup>14</sup> 34 C.F.R. §300.510(a).

deliberations of the IEP team. (FF 17, 20, 24, 33).<sup>15</sup> Additionally, the District will be ordered to perform a FBA.

Accordingly, there will be an award of tuition reimbursement.

#### Reimbursement for Educational Consultant

Parents claim reimbursement for the services of an educational consultant. Although that individual advised the family and participated in various meetings with school-based teams, she did not work with the student or provide direct services to the student. As such, the services are not recoverable through due process.

Accordingly, there will be no award of reimbursement for the educational consultant.

### **CONCLUSION**

Due to substantive and procedural acts and omissions on the part of the District, the student was denied a FAPE from October 15, 2008 onwards. Parents are also entitled to tuition reimbursement for the student's summer 2009 ESY programming and to an IEE at public expense. The claim for reimbursement for the services of an educational consultant is denied.

### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student has been denied a free appropriate public education for a period beginning October 15, 2008.

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<sup>15</sup> 34 C.F.R. 300.502(d).

Parents are awarded compensatory education, subject to the nature and limits set forth above, in an amount equal to 5.5 hours for every school day attended by the student, and every day of excused absence, from October 15, 2008 until the date of the IEP team meeting where an appropriate IEP is offered by the District.

Additionally, upon presentation by the parents of a bill for charges/account statement supplied by the private placement for all tuition, fees, and charges (including room and board) for the summer 2009 program, the District is ordered to pay jointly to parents 100% of the costs of the bill. This payment shall be made within 45 calendar days of the date the parents present the bill.

The District shall fund an independent comprehensive neuropsychological evaluation by a neuropsychological evaluator of the parents' choosing. Furthermore, within 10 school days of the date of this order, the District shall undertake the data collection to perform a comprehensive functional behavior assessment of the student's school-based behaviors.

Within ten school days of the date of the District's receipt of the independent neuropsychological evaluation referenced in the preceding paragraph, the IEP team shall convene to revise the student's then-current IEP.

Parents' claim for reimbursement for the services of an educational consultant is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

February 20, 2010