

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

FINAL DECISION AND ORDER

Student's Name: R.C.

Date of Birth: [redacted]

ODR No. 14685-1314KE

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro se

Center for Student Learning Charter
School at Pennsbury
134 Yardley Avenue
P.O. Box 338
Fallisington, PA 19058

Maria C. Ramola, Esquire
350 Eagleview Boulevard
Exton, PA 19314

Dates of Hearing: Decision on Stipulated Record

Record Closed: February 26, 2014

Date of Decision: March 14, 2014

Hearing Officer: Brian Jason Ford

Introduction

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The Center for Student Learning Charter School at Pennsbury (the Charter) initiated this due process hearing by filing a Complaint with the Office for Dispute Resolution on February 11, 2014. In the Complaint, the Charter avers that it is not an appropriate placement for the Student. For relief, the Charter seeks an order for “a change of placement for the Student that will allow for the safety of [the] Student and [other Charter] students, faculty and staff.” *Complaint* at 5.

The Compliant does not specify a particular placement that the Student should move to. Rather, through the Compliant, the Charter avers that the Student requires a therapeutic placement to address behavioral needs, suggests that any of several Pennsylvania Approved Private Schools (APS or APSs) could be appropriate, and includes one specific example of such an APS.

After the Complaint was filed, a number of pre-hearing emails were exchanged, and a lengthy pre-hearing conference call was convened. Through those emails and the conference call, the issues presented in the Complaint were reduced to a single issue, that issue was clarified, and the parties entered joint stipulations. The stipulations, although few and concise, provide all of the facts necessary to resolve this matter. Consequently, a hearing session was not convened and this matter is resolved on the stipulated facts. The issue, detailed below, is almost entirely a legal dispute, separate and apart from any factual disagreement.

Issue

The sole issue presented in this matter is whether the Charter may transmit student records to third parties, over parental objection, for the purpose of securing an appropriate placement for the Student.

Stipulated Facts¹

1. The Student is enrolled in the Charter.
2. The Charter is the Student’s Local Educational Agency (LEA).
3. The Student receives special education pursuant to an IEP.

¹ The parties and the Hearing Officer participated in a conference call on February 19, 2014. During that conference call, the parties agreed to certain facts and offered those facts as stipulations. After the call, on the same day, the Hearing Officer sent an email to the parties, listing what he understood to be the stipulated facts. Both parties replied to those emails on the same day, confirming that the stipulations, as articulated in the Hearing Officer’s email, were the agreed-to stipulations discussed on the conference call. In addition to those facts, undisputed facts (like the Charter’s LEA status) are also listed in this decision.

4. The Charter, currently, is not an appropriate school for the Student.
5. Because the Charter is an inappropriate placement, and cannot be made appropriate through other means, the parties agree that the Student should be placed in another school, outside of the Charter.²

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Charter the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

Students with disabilities are entitled to a FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14. FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit.

² The text of the stipulation in the Hearing Officer's email, which both parties agreed to, read as follows: "Based on our conversation, I understand that both parties (CSL and the Parents) agree that, for now, [Student] should not go to school at CSL. Both parties also agree that [Student] should go to school somewhere else. The parties agree that CSL is not an appropriate school for [Student] right now."

The FAPE standard is pertinent to this case only to the extent that the parties have stipulated that the Student's current placement is not appropriate. Consequently, the placement must be changed in order for the Student to receive a FAPE.

LRE and Continuum of Alternative Placements

The IDEA requires placement in the least restrictive environment (LRE):

To the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and . . . special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2)(i).

The LRE requirement, as indicated in the text of the regulation, does not operate relative to an individual student's needs. Several different placement options may be appropriate for any given student at any given time. The LRE requirement compels LEAs to place students in the least restrictive of all possibly appropriate placements.

Consistent with the foregoing, the IDEA establishes a continuum of alternative placements. 34 C.F.R. § 300.115. LEAs must make this continuum available to students in order to meet the needs of each individual student. 34 C.F.R. § 300.115(a). The continuum includes, in order of increasing restrictiveness, instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b).

In this case, the type of "other school" that the parties agree that the Student should be placed into, be it an APS, a private school, or something else entirely, is a "special school" for purposes of the IDEA's continuum.

Confidentiality of Student Records

The IDEA draws heavily from the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. § 99, to establish confidentiality requirements for student records. In general, and perhaps redundantly, the IDEA requires LEAs to comply with FERPA's confidentiality rules. See 34 C.F.R. § 300.610. The IDEA also incorporates FERPA's definition of "educational records." 34 C.F.R. § 300.611.

FERPA prohibits the disclosure of student records that contain personally identifiable information without parental consent. 34 C.F.R. § 99.30(a). There are, however, exceptions to this rule. Parental consent is not required to transmit records to "school officials... within the same agency... [who] have legitimate educational interests." 34

C.F.R. § 99.31(a)(1)(A). Third parties, like the potentially-appropriate schools in this case, may be considered “school officials” if certain conditions are met:

other parties to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

- (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
- (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
- (3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

34 C.F.R. § 99.31(a)(1)(B).

Discussion

Student’s Behaviors

The Complaint raises a number of very serious allegations concerning the Student’s behaviors. For purposes of this decision, those allegations are not relevant. As discussed in greater detail below, if an educational placement is inappropriate, and cannot be made appropriate, LEAs must move students into appropriate placements. This broad concept is operative regardless of the reason why a placement is inappropriate. For these reasons, the details of the Student’s alleged behaviors will not be discussed in this decision.

Arguments Concerning Transmission

The Charter argues that it cannot secure placement in another school without transmitting personally identifiable student records to those schools. I make no findings of fact concerning that particular argument, but it is consistent with the entirety of my experience. Moreover, it does not appear that the Parent contests the assertion that other schools will not accept the Student without reviewing some of the Student’s educational records.

The Parent, on the other hand, has refused to provide a blanket consent for the Charter to transmit all of the Student’s records to any potentially appropriate school. The Parent is concerned that some of the Student’s records contain inaccurate information. The Parent also does not want the records to go to certain schools, although the Parent did not provide a definitive list of all schools of which the Parent disapproves.

Analysis

The Charter must transmit records to other schools in order to provide a FAPE to the Student. The parties agree that the Charter is not an appropriate placement for the

Student. The parties agree that the Student must be placed elsewhere in order to receive a FAPE. To the extent that personally identifiable student records must be transmitted to third parties in order to secure a FAPE for the Student, the Charter may transmit those documents without running afoul of the IDEA.

In this case, the third party schools are “school officials” for purposes of FERPA, pursuant to 34 C.F.R. § 99.31(a)(1)(B). To satisfy the IDEA’s continuum of placements, the Charter, quite literally, is required to outsource instructional services or functions. The parties have agreed that this type of outsourcing is necessary in this case. The three additional conditions required by 34 C.F.R. § 99.31(a)(1)(B) are also met. First, the other schools would educate the Student, thereby performing “an institutional service or function for which the [Charter] would otherwise use employees.” Second, even after the placement, the Charter is still the Student’s LEA, and so the other school is “under the direct control of the [Charter] with respect to the use and maintenance of education records.”³ Third, the other schools are bound by FERPA’s use and redisclosure rules. Pennsylvania APSs are eligible to receive funds from the school districts and/or the Commonwealth in order to provide a FAPE for students with disabilities. A portion of those funds, ultimately, flows from the federal government. As such, APSs are bound by FERPA, including FERPA’s use and redisclosure provisions at 34 C.F.R. § 99.33(a). Further, even if the other school ultimately chosen for the Student is not an APS, the Student’s placement will be funded by the Charter. As such, the school will be the recipient of federal funds (albeit vicariously) and will be bound by FERPA – at least in relation to the Student in this case.

The Parent’s concerns notwithstanding, for the foregoing reasons, I conclude that the Charter may transmit records to third parties, as necessary to secure the provision of FAPE to the Student.⁴

An order consistent with the foregoing follows.

³ For example, after placement, the Charter would still be responsible for the provision of FAPE to the Student, and will continue to be responsible for the other school’s implementation of the Student’s IEP.

⁴ I note that I do not have authority to determine whether any action is consistent with or violates FERPA. Rather, I only determine that the transmissions contemplated by the Charter are consistent with the IDEA, which adopts FERPA’s confidentiality and transmission rules.

ORDER

Now, March 13, 2014, it is hereby **ORDERED** as follows:

1. The Charter may transmit personally identifiable student records to third party schools in order to secure an appropriate placement for the Student.
2. Written parental consent is not required prior to such transmission.
3. The Charter shall notify the Parent of any such transmission.
4. The Charter shall comply with all IDEA requirements concerning parental access to educational records, so that the Parent may access any record transmitted in accordance with this Order.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER