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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: L.B.

Date of Birth: [redacted]

ODR No. 1765/10-11-AS

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Dean Beer, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19312

Delaware County IU
200 Yale Avenue
Morton, PA 19070

Gabrielle Sereni, Esquire
Raffaele & Puppio
19 West Third Street
Media, PA 19063

Date of Hearing:

June 8, 2011

Record Closed:

July 12, 2011

Date of Decision:

July 22, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Child is an eligible resident in the area served by the Delaware County Intermediate Unit, and is attending a private typical preschool program. [NT 8; IU-17]¹ Child is identified with developmental delays secondary to a diagnosis of Down Syndrome pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). [NT 8] The Parents filed the present due process request under the IDEA and Section 504 of the Vocational Rehabilitation Act, 20 U.S.C. §794. (Section 504) seeking tuition reimbursement for their placement of Child in the typical preschool. The IU asserts that it is not required to fund the setting for its Early Intervention (EI) services.

The hearing was conducted in one session and the record closed upon receipt of written summations. I conclude that the IU is not obligated to reimburse Parents for tuition for the 2009-2010 and 2010-2011 years.

ISSUES

1. Was the program of EI services offered by the IU inappropriate because the IU did not provide funding for the typical preschool program?
2. Was the typical preschool program chosen by the Parents appropriate?
3. Does the balance of equities favor Parents' request?
4. Should the hearing officer order tuition reimbursement as requested?²

¹ All documents submitted by the parties are admitted into evidence without objection. The parties referenced documents submitted by the IU cited here as "IU." Parents submitted one document "P."

² The Parents initially requested reimbursement for full years of service including summer programming during the breaks in IU services. The Parents later withdrew this request. [NT 24-26, 77.]

FINDINGS OF FACT

1. Child received Birth to Three services in a home setting and in two classroom settings including classes provided through a local YMCA. [NT 78-86]
2. In January 2009 the Parent called the IU to inquire about transition to preschool Early Intervention. The IU service supervisor indicated that the Parent would have to wait for the IU evaluation before recommendations could be made as to available services. [NT 36-38]
3. The Parent reviewed available typical preschool programs prior to the evaluation and decided on the preschool program which Child has been attending. [NT 44-45]
4. The IU evaluated Child in July 2009 for purposes of transition to preschool Early Intervention. Child was found to have at least a 25% delay in one or more areas of development. The ER recommended EI services that included services located in a school environment. The ER noted that Parents had enrolled Child in a private typical preschool program beginning in the following fall. [IU-4]
5. The ER was discussed at a meeting on August 5, 2009 at which time an IEP was provided and discussed. [NT 45; IU-5]
6. The IEP noted the Parents had enrolled Child at the typical preschool program. The IEP offered placement in itinerant education service in the preschool setting. The IEP noted the “EI Preschool Location of Intervention” as “Early Childhood Environment / Regular (Preschool)” [IU-5]
7. The IEP offered a full time one-to-one aide and goals. Some of the goals made reference to classroom environment and required interaction with typical peers. [IU-5, IU-6]
8. The IEP team indicated to Parent that the private preschool placement was “the right placement for Child.” At no time did IU personnel undertake to fund the private typical preschool placement. [NT 45-46, 61-63, 253]
9. Parents sent their first tuition check to the private preschool on August 12, 2009 after the IEP meeting. [NT 46]
10. The IU issued a NOREP on August 13, 2009 offering to begin preschool Early Intervention and related services to Child “at [Child’s] selected preschool...” The NOREP indicated that Child “required instructional models that included typical peers” and stated as educational placement, “Early Childhood Environment / Regular [Preschool].” The Parents approved the NOREP on August 21, 2009. [IU-6]
11. The IU provides funding for reverse mainstream classrooms, considered a more restrictive level of service than that offered to Child. [NT 206]
12. The IU does not fund any other preschool classroom programs. [NT 200-201; P-1]

13. IU personnel did not suggest any other options for placement to the Parents during the August 2009 IEP meeting. [NT 58]
14. In December 2009, Parents wrote to the IU, requesting reimbursement for tuition at the typical private preschool program. The Parents did this because they had heard of another child for whom the IU had paid tuition at the same program. [NT 55, 237]
15. All services and goals offered by the IU could have been provided appropriately in settings other than the typical private preschool selected by the Parents. This could have included classroom settings with typical peers at YMCA and other programs. [NT 234-237]
16. After Parents requested tuition reimbursement, the IU personnel met with them and offered to show them two other settings with which the IU had a collaborative arrangement, and that would be either free or of lesser charge to Parents. Parents and a service supervisor from the IU toured both programs. [NT 56, 60, 63-75, 238-248]
17. The IU issued several subsequent IEPs and NOREPs offering the same level of services to Child for the 2010-2011 year. [IU-11, IU-12, IU-15, IU-16, IU-17]

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.³ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁴ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

³ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

⁴ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

IU OBLIGATION TO FUND PRESCHOOL CLASSES

In Pennsylvania Intermediate Units are not obligated to fund preschool classroom settings. [P-1] Preschool is not a mandated service, but is at the election of the parent. Therefore the IU does not offer reimbursement for preschool services.

The above state of the law and policy in Pennsylvania is not in dispute. The sole issue in this matter is whether or not it was necessary for the IU to fund a typical preschool classroom in order to provide services offered in the IEP. I find by a preponderance of the evidence that such funding was not necessary in order to provide the offered services.

APPROPRIATENESS OF THE IU-OFFERED SERVICES

The Parents characterized the issue as determined through a “Burlington-Carter” analysis. In light of my finding it is not necessary to address the second and third prongs of that analysis. Rather my decision is based upon the finding that the services offered by the IU were

appropriate, because they could have been provided in a variety of settings – settings that included the Parents’ selected setting, but also could have included any classroom setting that the Parents might have selected, including a variety of classes provided by agencies such as the local YMCA.

The Parents point out correctly that the documentation including IEPs and NOREPs, repeatedly recite that the setting for provision of services is a typical preschool classroom setting. However, many of the goals did not require a classroom setting, but could have been provided through a therapy model at home or in any other location. Moreover, I find by a preponderance of evidence that these references were based on the belief of IU personnel that the Parents already had selected the private preschool classroom setting, and thus were intended to be descriptive of the location in which services were to be provided, not prescriptive of any location necessary for provision of services.

This is corroborated by the fact that the Parents paid tuition immediately after the IEP meeting. This raises the inference that they did not expect the IU to pay that tuition in 2009. In fact Parents did not request tuition reimbursement until December of that year, after other parents told them that other parents had been reimbursed for the same preschool. Parents make much of the IU’s offer to show them two other preschool settings as an alternative to the setting which they have chosen. IU witnesses made clear that these settings would not be funded by the IU, but simply would be available at lower cost to parents.

Nor does the Parents’ dissatisfaction with those alternatives transform an appropriate program offered by the IU into an inappropriate one. Parents found both settings to raise serious safety issues for a child who had exhibited behaviors of eating foreign objects and running away, including attempting to run outdoors. However, Parents failed to demonstrate by a

preponderance of evidence that such dangers would not be prevented by the assigned one-to-one aide. Moreover, the Parents' chosen setting also exhibits similar dangers to a child with such behaviors.

In sum, the program offered by the IU was appropriate. I conclude that its offer of alternative settings is irrelevant. However, even if deemed relevant, the evidence is not preponderant that the alternate settings are unsafe or inappropriate.

Parents argue that the offered goals, by their nature, presuppose a full time, typical preschool classroom setting. Parents argue that the preeminent goals of the offered program are based on inclusion and on typical preschool routines that are intended to prepare the Child to function in a school age setting. The evidence as a whole does not support this contention by a preponderance. Even Parents' expert witness, the administrator of the typical private preschool program at which child is enrolled, declined pointedly to support this contention. When asked if the IU program could be provided "only" in a setting such as hers, the expert credibly⁵ declined to agree, stating that she could not go so far as to use the word "only".

CONCLUSION

I find by a preponderance of evidence that the program offered by the IU for the 2009-2010 and the 2010-2011 years was appropriate. I decline to order tuition reimbursement for either of those years. I decline to reach the remaining issues raised under the Burlington-Carter analysis.

⁵ I find that all witnesses were credible and reliable insofar as I have relied upon their testimony. I have considered that one witness' testimony (that of a supervisor of program at the IU) appeared to be contradicted partially in the record, but I find it reliable for the limited assertions on which I relied, because those assertions (as to IU policy on paying for private preschool) are corroborated.

Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The program of EI services offered by the IU was not inappropriate because the IU did not provide funding for the typical preschool program.
2. The hearing officer will not order tuition reimbursement as requested,

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

July 22, 2011