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Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

22632-19-20

Child's Name

A.B.

Date of Birth

Redacted

Parent(s)/Guardian(s)

Redacted

Counsel for Parent(s)/Guardian(s)

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Hearing Officer

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Date of Decision

02/25/2020

Introduction

This special education due process hearing concerns the educational rights of A.B. ("student"), a student who resides in the Colonial 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. The parties dispute the evaluation history of the student at the District and the District's past programming, although the parties stipulate that the student is eligible for special education under IDEIA and that this eligibility is based on an identification of specific learning disabilities. (See Notes of Testimony ["NT"] at 36-37).³

The student's parents claim that the District failed to evaluate the student appropriately and, as a result, failed to identify the student as a student eligible for special education. Furthermore, the parents claim the District failed to appropriately program for the student's needs, thereby denying the student a free appropriate public education ("FAPE"). Analogously, the parent asserts these denial-of-FAPE claims under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").⁴ As a result of these alleged deficiencies in the District's evaluation

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").

³ The parties also stipulate to the student's date of birth. (NT at 36-37).

⁴ 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").

and programming, parent unilaterally enrolled the student in a private placement, and parents seek tuition reimbursement for that enrollment for the 2017-2018, 2018-2019, and current 2019-2020 school years.

The District counters that at all times it met its obligations to the student under IDEIA and Section 504. Accordingly, the District argues that the parent is not entitled to any remedy.

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

Issues

1. Did the District, through acts and omissions, fail to provide FAPE to the student?
2. If so, are parents entitled to tuition reimbursement for their private placement of the student in the 2017-2018, 2018-2019, and/or 2019-2020 school years?

Procedural History

Certain elements of the procedural history will be set forth below:

- A. Parents filed their complaint in late August 2019, and the District filed a timely response. (Hearing Officer Exhibit ["HO"]-1, HO-2).
- B. The hearing convened at the initial session, scheduled for October 28, 2019. (HO-3).

- C. After the conclusion of the initial session, off the record, counsel for the parties and the hearing officer conferred about the number of additional witnesses and time-allotments for those witnesses' testimony to determine the number of sessions that would be needed to conclude the hearing. Seven witnesses were identified for the completion of the hearing. Collaboratively, it was determined that two additional hearing dates would be necessary to conclude the hearing. (HO-3).
- D. Two January hearing dates were identified, January 7th and January 14th. (HO-4).
- E. In late November 2019, counsel for the District requested rescheduling of the January 7th hearing date, as he had been scheduled for a pretrial conference in federal court on that date. The request was unopposed by parents. The January 7th hearing date was cancelled, and a new hearing date of January 21st was collaboratively selected to maintain two remaining hearing dates for the case. Therefore, the two remaining hearing dates were January 14th and January 21st. (HO-5, HO-6).
- F. On January 3, 2020, counsel for the District requested rescheduling of the January 14th hearing date, as he had been scheduled for a different pretrial conference in federal court on that date. Parents objected to the request for rescheduling, as they had arranged for the appearance of an expert witness at that session. (HO-7; NT at 115-133).

- G. The hearing officer declined to reschedule the January 14th session. In addition to parents' concern, the hearing officer shared with counsel a concern that cancelling so closely to the scheduled date would unnecessarily delay the proceedings, as rescheduling would require an evidentiary session in February. The hearing officer offered that co-counsel from the office of District counsel could step into the case and handle the January 14th session. (HO-7; NT at 115-133).
- H. The District, through counsel, objected to proceeding with anyone other than the attorney who had represented the District at the October 28th hearing session. (HO-8; NT at 115-133).
- I. Hearing planning proceeded as to the January 14th and January 21st hearing sessions, at times with pointed exchanges between counsel. (HO-9, HO-12; NT at 115-133).⁵
- J. Based on what was shared in the hearing-planning emails of counsel, in light of the witness/hearing planning that had taken place shortly after the October 28th session, certain witnesses were mentioned, and certain witnesses were not mentioned. The hearing officer queried counsel as to the status of his understanding between the previous planning and the recent planning. (HO-10; NT at 115-133).
- K. Counsel for the parents confirmed that there would be no witness appearing from the private placement where the student had been attending, and receiving services, for the 2017-2018, 2018-2019, and current 2019-2020 school years. (HO-11; NT at 115-133).

⁵ HO-12 is included as it contains an email response by counsel for the District to counsel for parents that completes the parties' views on a certain point asserted by the District. This response is not part of HO-9 but should be included to complete those email exchanges.

- L. Co-counsel for the District appeared at the January 14th hearing session and ably represented the District in that session. (NT at 112-364).
- M. On the evening of January 20th, the eve of the January 21st hearing session, the parties agreed to certain stipulations and jointly moved that the January 21st hearing session be cancelled without taking any further evidence. (HO-13).
- N. The parties stipulated to two matters which are set forth below as stipulated findings of fact. (HO-14).
- O. The parties submitted closing statements on February 11, 2020. (HO-15, HO-16).

Findings of Fact

All evidence of record was reviewed. The citation to any exhibit or aspect of testimony is to be viewed as the necessary, probative, and persuasive evidence in the mind of the hearing officer.

8th Grade

1. From kindergarten through 4th grade, the student attended a private parochial school. (NT at 41-110).
2. In 5th grade, the 2012-2013 school year, the student began to attend District schools. (NT at 41-110).
3. In the fall of 8th grade, in October 2015, the parents contacted the District for an evaluation of the student over concerns that the student was struggling with learning. The District evaluated the student and issued an evaluation report ("ER") in December 2015. (Parents Exhibit ["P"]-2).

4. Parent input in the December 2015 ER indicated that parents felt the student was experiencing difficulties with work-completion and academics, difficulties which were impacting student's mood at home when doing work or discussing academics. (P-2).
5. The December 2015 ER contained teacher input. (P-2).
6. In the December 2015 ER, the student's reading teacher indicated that the student was instructional at the late-5th grade reading level and required reading material at that level to be successful, struggling "to use ... reading skills and strategies when given a text above (the student's instructional) reading ability". The teacher further opined that the student was aware of these reading deficits "but does not know how to ask for help to clarify (understanding)". (P-2).
7. In the December 2015 ER, the student's English teacher indicated that she did not have curriculum-based assessment measures of reading but that her classroom-based assessments indicated weakness in reading skills. The teacher reported that "main weaknesses" were an inability to begin readily a task and a lack of self-advocacy skills to seek clarifications. The teacher also reported that the student appeared to "drift" in class, requiring prompting and re-direction, and appeared "despondent". (P-2).
8. In the December 2015 ER, the student's math teacher indicated that the student exhibited difficulty in conceptual understanding where interpretation or inference were required, as well as difficulty in communicating thoughts and ideas. The teacher reported that the student was inconsistent with paying attention, following directions, and completing homework. The teacher also reported that the student did not ask for help. (P-2).

9. In the December 2015 ER, the student's science teacher indicated that the student had difficulty applying area content to tests and assignments. The teacher reported that the student required information and directions to be repeated. The teacher also reported that the student was inconsistent with paying attention, following directions, class participation, and completing homework. (P-2).
10. In the December 2015 ER, the student's history teacher indicated that the student had difficulty initiating tasks and difficulty with the pace of the class. The teacher reported that "(the student) seems (to be) frustrated with ... academics". (P-2).
11. The District evaluator observed the student in the classroom environment during one English class. The observation reflected the input provided by the student's teachers:
 - During a brief pre-quiz study period with a partner, the student struggled to extemporaneously identify vocabulary words.
 - The student did not engage diligently in the quiz, often staring at the paper and not writing. The majority of the class finished the quiz well before the student, who was the last student in the class to complete the quiz.
 - The class moved on to review of a previous writing assignment. The teacher returned each classmate's assignment as each finished the quiz but neglected to return the student's assignment. The teacher began to review common errors in the assignment, but the student did not initiate contact with the teacher or ask for the assignment. Eventually, the teacher noticed that the student did not have the returned assignment and returned it to the student.

- The class watched a video about a grammatical error common found in many of the assignments. The student appeared to pay attention to the video.
 - After the video, the class was instructed to self-assess their assignments and the errors each had made. The student did not engage in this activity, staring at others and then chatting with a classmate. The teacher engaged the student and began to discuss an error in the student's work. The student said "I don't know" when asked why it was marked wrong. The teacher reminded the student that this error was discussed in the video. The student remarked that the student did not recall the video and couldn't explain the error. (P-2).
12. The evaluator used an instrument to quantitatively gauge the on-task activity of the student during the observation. The student was found to be on task approximately 80% of the class, but the evaluator noted that much of the on-task time was difficult to assess as the student was looking at the quiz and the returned assignment, but it was not possible to gauge whether this was active engagement with work. (P-2).
 13. In the December 2015 ER, the student showed honesty and self-awareness through conversations related by the evaluator. The student related that 8th grade academics were more challenging and that the student's mind would often wander during instruction. (P-2).
 14. The student's teachers reported utilizing various regular education interventions to assist the student. The most intensive intervention were twice-weekly homework assistance after school, and a weekly session to review grades/assignments, and to help with organization and study habits. (P-2).

15. Cognitive assessment in the December 2015 yielded a full-scale IQ score of 99, in the average range. (P-2).
16. Achievement assessment in the December 2015 yielded scores in the average range for all sub-tests and composite scores in oral language, reading, written expression, and mathematics. (P-2).
17. The student's scores on the Pennsylvania Standard State Assessment ("PSSA") were basic in reading and mathematics. (P-2, P-15).
18. The December 2015 ER included a social/emotional/behavioral assessment, completed by the student's mother and a teacher, and a self-report completed by the student. (P-2).
19. The student's mother rated the student as clinically significant in the anxiety sub-scale and the internalizing problems composite. The teacher did not rate the student as clinically significant in any area. The student's mother rated the student as at-risk in somatization and functional communication sub-scales. The teacher rated the student as at-risk in the attention problems, learning problems, social skills, leadership, and functional communication sub-scales, and the school problems composite. (P-2).
20. The student's self-report rated the sense of inadequacy, attention problems, and self-reliance sub-scales as clinically significant, and the attitude to school sub-scale and emotional symptoms index as at-risk. (P-2).
21. The December 2015 ER included an attention-issues assessment completed by four teachers and the student's mother. The scoring rubric on the instrument did not support a finding of attention deficit hyperactivity disorder ("ADHD") for inattentive, hyperactive/impulsive, or combined types. (P-2).

22. The December 2015 ER concluded that the student did not have a disability and so did not require special education. (P-2, P-3).
23. The student's parents continued to communicate with the student's teachers as the student struggled in the second half of 8th grade. (P-17 at pages 7-24).
24. The student's final grades in major academic classes were as follows: English – D, History – D, Math – D, Science – C. The student received no grade in reading, but the year-end reading report recommended that the student continue to take a reading class in high school. (P-2).⁶

Summer between 8th & 9th Grades

25. Following 8th grade, the student's parents were still concerned with the student's academic difficulties and secured a private evaluation. (P-5; NT at 41-110, 139-263).
26. In July 2016, the private evaluator issued a private evaluation. (P-5).
27. The private evaluator relied on parent report and did not speak with anyone at the District. (P-5; NT at 139-263).
28. The July 2016 private evaluation utilized a number of assessments. (P-5).

⁶ By the time the student's PSSA scores for 8th grade were issued in the fall of the student's 9th grade year, the student had been enrolled in the private placement. The student scored below basic in mathematics and science, and basic in English/language arts. (P-14).

29. The evaluator conducted a cognitive assessment, the same assessment which the District evaluator had utilized approximately 7 months before. This led to a possible practice effect on the assessment and, indeed, the student's full-scale IQ was scored at 119. The evaluator had not been informed by parents of the District's December 2015 evaluation. (P-5; NT at 139-263, 265-363).
30. The evaluator conducted an achievement assessment, a different assessment from that which the District evaluator had utilized. When applying the higher IQ score (119), the results of the achievement testing showed significant discrepancies between ability and achievement in various sub-tests of the assessment. With the lower of the IQ score (99), however, the student exhibited significant discrepancies in reading rate and word reading fluency. (P-5).
31. The evaluator administered a number of specialized assessments in reading, most of which confirmed weak reading skills. (P-5).
32. The evaluator conducted an executive functioning assessment, completed by the student's mother and the student, which found significant executive functioning deficits. (P-5).
33. The evaluator administered an assessment for attentional issues which led the evaluator to conclude that the student may qualify for a medical diagnosis of ADHD. (P-5).
34. The evaluator concluded that the student qualified for a psychological diagnosis of a specific learning disability in reading. (P-5).
35. The evaluator did not consult with anyone at the District in the process of completing the July 2016 evaluation. (NT at 139-263).

36. The evaluator is a deeply experienced licensed psychologist but does not have a background or experience in school psychology or school environments. The evaluator is not familiar with the IDEIA. (NT at 139-263).
37. In August 2016, the parents provided the private evaluation report to the District. (P-17 at page 41).
38. In August 2016, the family struggled with the decision whether to return the student to the District or to enroll the student in a private placement. The student was resistant to leaving the District. Ultimately, the parents undertook enrolled the student in the private placement. (NT at 41-110).

9th Grade

39. The student attended the private placement in 2016-2017 school year, the student's 9th grade year. (P-1 at pages 2, 40, P-17 at pages 25-28; NT at 41-110).

10th Grade

40. The student attended the private placement in 2017-2018 school year, the student's 10th grade year. (P-1 at pages 1-34; NT at 41-110).
41. As 10th grade neared its end, in April 2018, the student voiced an interest in returning to the District. The parents investigated re-enrolling the student in the District. (P-17 at pages 29-37; NT at 41-110).
42. As part of the re-enrollment process, parents requested that the student be evaluated by the District for eligibility for special education. In June 2018, parents granted permission for the evaluation of the student. (P-6, S-5).

43. In August 2018, prior to the commencement of the 2018-2019 school year, the parents informed the District that without special education programming in place for the student, they were returning the student to the private placement. Parents requested that the District fund the tuition. (P-17 at page 38-40; S-8, S-9).

11th Grade

44. The student returned to the private placement in 2018-2019 school year, the student's 11th grade year. (NT at 41-110).
45. In October 2018, the District issued its ER. (P-8, S-11).
46. The October 2018 ER included the school psychologist's review of the December 2015 ER and the July 2016 private evaluation. (P-8, S-11).
47. The District evaluator did not consult with anyone at the private placement in the process of completing the October 2018 evaluation. (P-8, S-11).
48. Cognitive assessment in the October 2018 ER yielded a general ability index score of 98, in the average range. Cognitive results also revealed marked weakness in working memory and processing speed. (P-8, S-11).
49. Achievement assessment in the October 2018 ER yielded scores in the average range for most sub-tests. Based on the cognitive assessment results, the student exhibited significant discrepancies in math fluency/addition and math fluency/multiplication. While not significantly discrepant, the evaluator noted low scores in oral reading fluency. (P-8, S-11).
50. The October 2018 ER included a social/emotional/behavioral assessment, completed by the student's mother. (P-8, S-11).

51. The student's mother did not rate the student as clinically significant in any area but did rate the student as at-risk on the attention problems sub-test. The student's mother also rated the student as at-risk on the anxiety sub-test, but the evaluator did not include that score in the analysis of results. (P-8, S-11).
52. The October 2018 ER concluded that the student had a specific learning disability in reading fluency and reading comprehension, based on the achievement assessment in the evaluation. There was no finding that the student had a specific learning disability in mathematics calculation. The ER recommended that the student qualify for special education. (P-8, S-11).
53. In November 2018, the District proposed an IEP for implementation at the District. (P-9, S-13).
54. The November 2018 IEP included information from the October 2018 ER for the student's present levels of academic and functional performance. (P-9, S-13).
55. The November 2018 IEP contained one goal, in reading comprehension. (P-9, S-13).
56. The November 2018 IEP contained specially designed instruction to address reading fluency and organization/task-approach skills. (P-9, S-13).
57. The November 2018 IEP recommended a placement in regular education for nearly the entire school day (98.67%). (P-9, S-13).
58. The parties stipulate that the case manager/special education teacher involved in developing the November 2018 IEP had never worked directly with the student or observed the student in an academic or school setting. (HO-14).

59. The parties stipulate that, in developing the November 2018 IEP, the case manager/special education teacher did not speak with, or identify, a representative from the private placement on the invitation to participate in the November 2018 IEP team meeting. (HO-14).
60. Parents did not approve the recommended program/placement, and the student continued to attend the private placement for 11th grade. (P-9, S-13).
61. In August 2019, prior to the commencement of the current 2019-2020 school year, the parents informed the District that they felt the District could not provide an appropriate education to the student and that they were returning the student to the private placement. Parents requested that the District fund the tuition. (S-10).

12th Grade

62. The student returned to the private placement for the current 2019-2020 school year, the student's 12th grade year. (NT at 41-110).
63. In late August 2019, parents filed the complaint which led to these proceedings. (HO-1).
64. In September 2019, the private evaluator who had issued the July 2016 evaluation issued an updated evaluation report, requested by the parents to determine how the student's learning challenges might impact the student in post-secondary academic or vocational study. (P-10).
65. The evaluator performed a 2-3-hour observation of the student and spoke with educators at the private placement. The evaluator testified to this observation and conversation, but neither were documented in the September 2019 evaluation report. (P-10).

66. Although the student's progress reports from the private placement were made part of the record through the testimony of the student's mother, the parents did not call any witness from the private placement to testify to the programming, specialized instruction, or services that the student receives. (P-15; NT at 41-110).⁷

Discussion

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. (Andrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S., 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); K.D. v. Downingtown Area School District, F.3d (3d Cir. at No. 17-3605, September 18, 2018)).

Additionally, 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

⁷ This witness was planned-for as part of hearing planning following the October 28th hearing session, but that person did not testify. Parents did not request a subpoena for that person's appearance.

examination of the parents' tuition reimbursement claim will proceed 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. Here, the District denied the student FAPE. First, the District's initial evaluation in December 2015 supports a conclusion that the student should have received services to support the student's learning challenges. Given the consistent, and significant, learning challenges that the student was exhibiting in all academic subjects at the time of the evaluation—made plan through the input of the student's teachers and even in the one-period classroom observation by the evaluator—the conclusion that the student did not have a disability was faulty. Whether or not the student, at that time, should have qualified for an IEP or a Section 504 plan (to provide academic support that is not specially designed instruction) is not knowable. But reading the December 2015 ER fully supports a finding that the District erred in walking away from the student without providing some type of structured academic support.⁸ Of course, the student's deep struggles thereafter 8th grade, and the parents' and teachers' struggles as well to support the student, continued for the remainder of the school year. And while the deficiencies in the December 2015 ER are not part of the claim for remedy, this report is the entire foundation for everything that parents were forced to undertake for themselves—the private evaluation in July of 2016 and, ultimately, the enrollment at the private placement.

⁸ Furthermore, the contents of the ER in terms of the student's learning experiences, as related by the teachers, should have supported additional assessments to probe more deeply the areas where the student was clearly struggling.

Second, the October 2018 ER, while identifying the student with a specific learning disability in reading—which is wholly supported on this record, taken in its entirety—it fails to identify the student with a specific learning disability in mathematics calculation, clearly the student’s weakest area of achievement testing (P-8 at pages 5-6) and, again, wholly support by the record. Consequently, the lack of any IEP goals or specially designed instruction in mathematics calculation renders the November 2018 IEP in appropriate. Thus, at step one of the Burlington-Carter analysis, parents have carried their burden of proof: The District denied the student FAPE.

When a school district program is found to be inappropriate at step one of the Burlington-Carter analysis, as is the case here, step two of the analysis is an examination of the appropriateness of the private placement which the parents have selected. Here, parents have failed to carry their burden of proof.

This is matter of evidence, or more accurately, as a lack of evidence. The record contains no reliable evidence of the programming, or specialized instruction, or services that the student received at the private placement. The entire thrust of this aspect of the Burlington-Carter analysis is to show that, where a school district has failed in its obligation to provide FAPE, the parents have undertaken a private placement that addresses those needs. Simply put, there is no evidence to show how the private placement addresses the student’s needs. There is evidence of outcomes (the progress reports issued by the private placement at P-15), but that evidence does not give insight into the instruction and services that the student receives. By analogy, accepting these reports as evidence of programming for a special needs student would be akin to accepting a school district’s report cards as evidence of programming for a child. In either case, it is a failure of evidence.

There is also some evidence about what the private evaluator related about the private placement from his general knowledge of the school and his conversations with educators there. Here, there are three flaws. One, what evidence is here is scant—the evaluator could not testify with any sense of depth or concreteness. Two, what was related about the programming is hearsay—the evaluator has no firsthand knowledge of the school’s programming generally, or the student’s programming specifically. Three, and this is a critical factor in the mind of the hearing officer, the evaluator has no experience in school psychology, or in education let alone special education. Whatever observations or information the evaluator brought to the table, and as expert as the witness was in matters of general psychology, that testimony was accorded very little weight.

Thus, at step two of the Burlington-Carter analysis, parents have failed to carry their burden of proof: There is no evidence that allows this hearing officer to gauge how the individual learning needs of the student have been understood by the private placement or how the private placement addresses those needs with programming, specialized instruction, or services.

When parents fail at either step one or step two of the Burlington-Carter analysis, the analysis normally ends at that point. Here, even though the parents failed to carry their burden of proof at step two the analysis, the third step of the Burlington-Carter analysis— a balancing of the equities between the parties to see if the equities should impact the claim for tuition reimbursement—will be addressed briefly. On this record, the equities do not significantly weigh for, or against, either party.

Accordingly, the parent is not entitled to tuition reimbursement.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, the parents have failed to carry their burden of proof on the claim for tuition reimbursement by the Colonial School District for parents' unilateral private placement for the 2017-2018, 2018-2019, and 2019-2020 school years.

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

February 25, 2020