

*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

### DECISION

Child's Name: M.B.

Date of Birth: [redacted]

Dates of Hearing:

November 17, 2012

December 19, 2012

### **CLOSED HEARING**

ODR Case #3202-1112KE

Parties to the Hearing:

Parents

Avon Grove School District  
383 S. Jennersville Road  
West Grove, PA 19390

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

David Thalheimer, Esquire  
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January 14, 2013

January 29, 2013

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a [teenaged] student residing in the School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)<sup>1</sup> for specially designed instruction/related services for a significant specific learning disabilities in reading and written expression as well as speech and language impairment.

As the result of a settlement agreement from a prior dispute between the parties, the student attended a private educational placement at public expense for the summer of 2011 and the 2011-2012 school year. As the 2012-2013 school year approached, the parties could not agree on the educational program for the current school year. Parents claim that the individualized education plan (“IEP”) proposed by the District for the 2012-2013 school year is inappropriate, and filed the special education due process complaint that led to these proceedings.<sup>2</sup> The District counters that the program proposed for the student is appropriate, and, accordingly, continued attendance of the student at the

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<sup>1</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163.

<sup>2</sup> The parents originally filed their special education due process complaint in late May 2012 with a hearing scheduled for August 2012. Shortly before the hearing date, the parties had seemingly reached an agreement to resolve the dispute. An order was issued on August 15, 2012, conditionally dismissing the case pending approval of a settlement between the parties. Under the terms of the order, however, parents were granted a 60-day window to reinstate the complaint should the parties not be able to consummate the settlement. The parties were unable to finalize a settlement, and the complaint was reinstated on October 11, 2012, leading to these proceedings.

private placement in the current school year would be only at private expense. Under the terms of the settlement agreement, the student remains in the private placement at public expense for the current school year pending resolution of these proceedings.<sup>3</sup>

For the reasons set forth below, I find that the District has failed to propose an appropriate IEP. Therefore, the student will remain at the private placement at public expense for the 2012-2013 school year, and placement for summer 2013 programming will also be at public expense.

### **ISSUES**

Is the proposed IEP for the 2012-2013 school year appropriate?

### **FINDINGS OF FACT**

1. The student attended District schools since kindergarten. (Parents' Exhibit ["P"]-2).
2. In September 2006, the student's 3<sup>rd</sup> grade year, the student was identified as a student with a specific learning disability in reading. The student's identification was confirmed in a re-evaluation report ("RR") in September 2009. (P-12).
3. In January 2011, as the result of a private evaluation, the student was additionally identified as a student with a specific learning disability in written expression and both receptive and expressive speech and language impairments. (P-23, P-24; School District Exhibit ["S"]-1).

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<sup>3</sup> It appears that the parties are in agreement that there is no "reimbursement" owed to parents because the private placement is considered by the parties to be the student's pendent placement for the 2012-2013 and, under the terms of the settlement agreement of October 2011, the placement is at District expense. (School District Exhibit 4; Notes of Testimony at 25-26).

4. In October 2011, the parties settled a dispute regarding the student's educational programming. Under the terms of the settlement agreement, the District agreed to pay for a private placement the student had attended in the summer of 2011 and for the then-current 2011-2012 school year. As part of the agreement, the parents agreed to allow, and to participate in, a re-evaluation process in the spring of 2012, a process that would ultimately result in the development of an IEP by May 30, 2012. (S-4).
5. In late April 2012, the District issued its RR. (S-5).
6. The student's cognitive ability from the January 2011 private evaluation, assessed on the Wechsler Intelligence Scale for Children (4<sup>th</sup> edition), was 87, the low-average range. The District evaluator used results from that assessment, utilizing the general ability index ("GAI") of 90 given the student's significant deficits in working memory. (S-1; S-5 at pages 11-12, 32, 36).
7. On the reading and writing portions of the Wechsler Individual Achievement Test (3<sup>rd</sup> edition) ("WIAT-III"), using the evaluator's GAI score of 90, the student showed significant discrepancies between cognitive ability and achievement in word reading and spelling, as well as the accuracy sub-test in reading fluency and the sentence building sub-test in sentence composition. (S-5 at page 17).
8. On the Woodcock Reading Mastery Tests (3<sup>rd</sup> edition), using the GAI score of 90, the student showed significant discrepancies between cognitive ability and achievement in basic reading skill, including the word identification and work attack sub-tests. Overall, in total reading, the student showed a significant discrepancy between cognitive ability and achievement. (S-5 at page 18-19).
9. The District administered the spontaneous writing portion of the Test of Written Language (4<sup>th</sup> edition). While the score on this assessment did not reveal a significant discrepancy between cognitive ability and achievement, the District's evaluator opined: "(the student) struggled with grammar and word form, similar to writing portions of the WIAT-III. (The student) wrote 'an' for 'and', 'there' for 'their', and often missed writing whole words that made...sentences hard to understand at first read. Spelling was also an area of weakness on this assessment. (The student's) vocabulary/word choice could have been better. For example, (the student) described lightning as 'yelling' instead of loud or

- crashing.” Ultimately, the RR concluded that “(the student’s) writing is affected by (the student’s) language difficulties.” (S-5 at pages 19-20).
10. On the Clinical Evaluation of Language Fundamentals (4<sup>th</sup> edition), the student scored in the “borderline severe” range for both expressive and receptive language. On the Comprehensive Assessment of Spoken Language, the student scored below average on the idiomatic language, antonym, and grammatical morpheme sub-tests. On the Comprehensive Test of Phonological Processing, the student scored below average on the phonological memory sub-test. (S-5 at pages 22-23).
  11. The student’s significant auditory processing and memory needs play a large role in the student’s ability to receive instruction orally, and hold /manipulate information in thinking. Those needs also affect the student’s response to learning environments. (P-17, P-22, P-23, P-24; S-1, S-5, S-11; Notes of Testimony [“NT”] at 100-101, 277-278, 312, 319-320, 423-431, 435-443, 450-451, 480-482, 979).
  12. The April 2012 RR concluded that the student should be identified as a student with specific learning disabilities in reading and written expression, and a speech and language impairment. The April RR identified needs in reading decoding, word recognition, reading fluency, reading comprehension, written expression (spelling/grammar), improving auditory memory, comprehension/use of grammatical morphemes, and comprehension/use of complex sentences. (S-5 at pages 31-33).
  13. In mid-May 2012, the student’s IEP team met to consider the student’s IEP proposed by the District for the 2012-2013 school year. (S-6, S-7, S-16).
  14. The May 2012 IEP contained pertinent results from the April 2012 RR, including the student’s identified needs. (S-6 at 8-14).
  15. The May 2012 IEP contains one goal in reading fluency/accuracy, one goal in three-paragraph composition, a reading comprehension goal, and four speech and language goals (related to use of complex oral sentences, recall of oral information, identifying synonyms/antonyms, and identifying suffixes/prefixes/root words). (S-6 at pages 22-28).
  16. The May 2012 IEP determined that the student did not require extended school year (“ESY”) services. (S-6 at page 35).

17. The District's proposed reading instruction would include a largely call-and-response and orally-delivered reading program of multiple students 4 class periods per week (with a 5<sup>th</sup> period for listening to audio recordings of self-selected independent reading). The instruction is largely group-oriented, that is working with all students in the class period at one time as they progress through the lessons. Students who do not keep pace present instructional challenges. (S-8; NT at 423-431, 435-437, 443-457, 480-482, 481-492, 497-498, 808-816, 958-960, 1042-1055, 1064-1070).
18. In late May 2012, the student's parents filed the special education due process complaint that ultimately led to these proceedings. (S-10).
19. The student finished the 2011-2012 school year at the private placement and attended summer instruction in the summer of 2012. (S-9, S-12).
20. The private placement addresses the student's needs in reading and written expression. The student made educational progress at the private placement in the 2011-2012 school year. In the 2012-2013 school year, the student continues to engage in appropriate instruction and to make educational progress. (P-27, P-28, P-29, P-31, P-32, P-32a; S-9, S-11; NT at 251, 277-281, 287-309, 312-325, 327-328, 351-353, 504-505, 706-855).
21. In July 2012, the independent evaluator who issued the January 2011 evaluation report provided an update to that report. The private evaluator found that the student continued to show significant weaknesses in sight word identification/retrieval, non-word reading, reading fluency/accuracy, decoding fluency/accuracy, reading comprehension, spelling, and written expression. (S-11 at page 2).
22. The independent evaluator opined that "difficulties regarding working memory, sequencing, auditory/language processing and retrieval impeded (the student's) performance." (S-11 at page 2).
23. The July 2012 independent evaluation update found that the student "exhibited severe difficulties in working memory, rote auditory attention/retrieval and the ability to hold in mind and process information". (S-11 at page 2).

## **DISCUSSION AND CONCLUSIONS OF LAW**

To assure that an eligible child receives a free appropriate public education (“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” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

Long-standing case law and the IDEA 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 IDEA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

In this matter, parents’ claim is not strictly for tuition reimbursement because the private placement continues to be at public expense. But a tuition reimbursement analysis obviously guides the legal

consideration of the claim because while the student's placement remains at the private placement, the parties dispute whether that placement will continue to be at public or private expense for the 2012-2013 school year.

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program and whether it was reasonably calculated to yield meaningful education benefit (34 C.F.R. §300.17; Rowley; Ridgewood; M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)). In this case, this question is the crux of the dispute between the parties. Here, the District's May 2012 IEP is not reasonably calculated to yield meaningful education benefit.

The most glaring omission from the May 2012 IEP is a goal for decoding. Across assessments by multiple evaluators, the student has demonstrated consistent, significant deficiencies in decoding, in recognizing and attacking words. The May 2012 IEP contains no goal in addressing this need. The reading fluency/accuracy goal speaks to these skills ("Given non-controlled passages at the 7<sup>th</sup> grade level, (the student) will apply learned decoding and word analysis strategies..." [S-6 at page 22]), but there is no goal outlining how instruction in those critical deficit areas will be goal-driven. Testimony by District witnesses that decoding is "embedded" or addressed implicitly in the reading fluency goal was unpersuasive. The District's April 2012 RR identifies needs in decoding and word recognition; indeed, anyone familiar with the student's



education by experience or through this record can readily see the student's need in those fundamental reading skill areas. But the May 2012 IEP goals do not address that need.

Likewise, there is no goal in the May 2012 IEP addressing spelling or grammar. The April 2012 RR was quite explicit about how these needs surfaced outside of standardized assessment of written expression, and, again, identifies those areas of need. But the May 2012 IEP does not address those needs. Granted, the three-paragraph composition goal speaks to these skills (the various compositional elements having to be met along with "...85 percent of all words spelled correctly, 90 percent of all required punctuation correct, and 100 percent correct grammar..." [S-6 at page 23]). Again, as with decoding above, the District seeks to make an implicit goal out of mere mention of something in a goal geared to another need. The spelling and grammar addressed in the composition goal are markers of meaningful progress on that goal, perhaps, but not explicit spelling and grammar goals that can be addressed through specially designed instruction.

Additionally, the District's proposed reading instruction does not seem to be appropriately geared toward the student's needs. Said another way, the reading instruction seems to be grounded instructionally and environmentally in ways that, given the student's deficits, are counter-productive. Namely, the District's proposed reading program is based on storing auditory information in a call-and-response

group setting where the instruction is predominantly oral. This approach would seem to play into the very deficits that markedly interfere with the student's instruction: auditory processing and memory/retrieval issues. Also, the group orientation and pacing of instruction is ill-suited to the student, whose decoding skills are markedly age-inappropriate. For this student, individual pacing is a necessity.

Finally, while no specific data was presented regarding the District's determination that the student did not require ESY programming, the entirety of the record supports the opposite finding. The student's significant needs in decoding, reading fluency, and reading comprehension require that the student engage in ESY programming.

For the foregoing reasons, the May 2012 IEP proposed by the District is inappropriate. While it is arguably not required to continue with the Burlington-Carter analysis because the appropriateness/inappropriateness of the District's program is dispositive in this case, the decision will briefly address the remaining two steps of the analysis. When the school district's program is found to be inappropriate, as here, the second step is an examination of the appropriateness of the private placement which the parents have selected. In this case, the parents have met the burden in showing that the private placement is appropriate. The private placement provides programming that allows the student to make significant academic progress. Therefore, the parents have met the burden at step two of the

Burlington-Carter analysis in showing that the private placement is appropriate.

When the school district's proposed program is found to be inappropriate, as here, and the private placement is found to be appropriate, as here, the third step of the analysis is to determine if tuition reimbursement is a fair remedy and, if so, in what amount. This is the so-called "balancing of the equities" step. Here, the equities do not weigh decidedly in favor or against either party.

Accordingly and in sum, the student's parents are entitled to have the student continue at the private placement for the 2012-2013 school year and attend summer 2013 programming at the private placement at public expense.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student's private placement for the 2012-2013 school year will continue to be at public expense. Additionally, the District is ordered to pay for any summer 2013 programming undertaken by parents at the private placement.

To the extent that this hearing officer has misunderstood the relationship between the parties regarding tuition for the student's 2012-

2013 school year or summer 2013 programming at the private placement, or matters outside of this record do not lead to a perfected understanding of that relationship, and parents have been placed in a position to absorb out-of-pocket expenses for tuition at the private placement for the 2012-2013 school year or summer 2013 programming or related transportation, the District is ordered to reimburse parents. Upon presentation to the District by the parent of proof of payment for the 2012-2013 school year or summer 2013 programming, payment shall be made within 60 calendar days of the date the parent presents the documentation.

Any claim not specifically addressed in this decision and order is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

January 29, 2013