

*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: A.K.

Date of Birth: [redacted]

Dates of Hearing:

August 3, 2012  
October 24, 2012  
November 12, 2012

**CLOSED HEARING**  
ODR Case # 3235-1112AS

Parties to the Hearing:

Parent

Upper Dublin School District  
1580 Fort Washington Avenue  
Maple Glen, PA 19002

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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December 3, 2011

December 18, 2012

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (“student”) is a [teenaged] student residing in the Upper Dublin School District (“District”). The parties dispute whether the student qualifies as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>. Parent contends that the student qualifies as a student with a disability under the terms of the IDEIA, specifically as a student with an emotional disturbance. The District, through an evaluation process in 2010, had found the student to be eligible as a student with an emotional disturbance. Following a re-evaluation process in spring 2012, however, the District found that the student was no longer eligible.

The parties’ disagreement over the student’s eligibility is the foundation of a more pointed dispute, namely a tuition reimbursement claim for a private education placement. As the result of an agreement between the parties, the student was in a District-funded private placement for the 2010-2011 and 2011-2012 school years. Parent’s disagreement with the District’s re-evaluation process and conclusions in spring 2012 led the parent to maintain the private placement for the 2012-2013 school year and seek tuition reimbursement.

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

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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. *See also* 22 PA Code §§14.101-14.162.

## **ISSUES**

Did the District appropriately re-evaluate the student for eligibility under IDEIA?

Is the parent entitled to tuition reimbursement for the unilateral private placement undertaken for the 2012-2013 school year?

## **FINDINGS OF FACT**

1. In June 2010, the student was identified as eligible under the terms of IDEIA as a student with an emotional disturbance after exhibiting significant emotional needs in the educational environment including consistent school avoidance. (School District Exhibit ["S"]-1).
2. In July 2010, the District and parent collaborated on an individualized education plan ("IEP"). In August 2010, the District issued a notice of recommended educational placement ("NOREP") for the upcoming 2010-2011 school year. (Parent's Exhibit ["P"]-1, P-2).
3. The parent rejected the NOREP and unilaterally placed the student in a private school for the 2010-2011 school year. (Notes of Testimony ["NT"] at 385).
4. In August 2011, the parties resolved the disagreement over the student's educational programming by agreeing to reimburse the

- parent for tuition for the 2010-2011 school year and to fund the tuition for the 2011-2012 school year. (S-2).
5. As part of the August 2011 agreement, the parties agreed that the District could seek a re-evaluation of the student. To the extent that the District would continue to find the student eligible under the terms of the IDEIA, the District would hold an IEP meeting by April 1, 2012. (S-1).
  6. In January 2012, the District sought to re-evaluate the student. (S-3, S-4).
  7. After meetings between the parties in February 2012, the District received permission to evaluate the student. (P-7; S-5, S-6, S-7; NT at 95-96, 388-389).
  8. The District evaluator discounted the results of the June 2010 evaluation. (NT at 235-240).
  9. The District evaluator gathered parental input, observed the private school placement, administered assessments, and interviewed individuals at the private placement, although each of these data-gathering efforts was flawed to some degree. (P-14, P-17; S-9, S-10, S-12; NT at 153-155, 186-187, 200-204, 256-257, 300-304, 335-338, 348-350, 392-393, 548-552, 562-564, 610-612, 692-695).

10. The District evaluator did not speak with the student's psychiatrist or inquire about any private counselor. (NT at 98-102, 673-680).
11. In March 2012, after interviewing the student and discovering that the student was treating with a private counselor, the District evaluator sought consent to speak with the counselor. The request came on the cusp of the District's issuance of the re-evaluation report, and the parent gave consent. The District evaluator and private counselor never connected with each other. (P-8; S-13; NT at 229-231, 590-592, 675-677).
12. On March 23, 2012, the District issued its re-evaluation report ("RR"). (S-11, S-12).
13. The RR concluded that the student was no longer eligible under IDEIA as a student with an emotional disturbance. The RR concluded, however, that the student qualified as a student with a disability under the Rehabilitation Act of 1973 (specifically under Section 504 of that statute, hence the follow-on reference to this section as "Section 504").<sup>2</sup> (S-12).
14. On April 4, 2012, the student's parent informed the District in writing that she would continue the student's private placement

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<sup>2</sup> 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.

in the 2012-2013 school year and seek reimbursement for the placement. (P-10).

15. The private school has addressed the student's emotional needs in the educational environment (NT at 322-334, 478-482, 576-580).

16. The student has made academic progress at the private placement. (P-14, P-17).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Evaluation

When re-evaluating a student, a school district's re-evaluation must be comprehensive and must seek to provide all relevant data to inform the multi-disciplinary team of the student's educational needs. (34 C.F.R. §§300.303-304). Under the IDEIA, a student is eligible as a student with an emotional disturbance where he or she exhibits:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (a) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behavior or feelings under normal circumstances; (d) a general pervasive mood of unhappiness or depression; or (e) a tendency to develop physical

symptoms or fears associated with personal or school problems. (34 C.F.R. §300.8(c)(4)(i)).

If a student is determined to be eligible as a student with a disability, such as an emotional disturbance, and as a result of the disability is determined to need special education and related services, an IEP must be developed for the student. (34 C.F.R. §300.306(c)(2)).

In this case, in 2010, the District had identified the student with an emotional disturbance after the student exhibited significant emotional needs in the educational environment. The District proposed an IEP to address these needs. Two years later, the District engaged in a flawed evaluation process which resulted in a flawed RR.

The record in its entirety clearly supports the conclusion that the student, even in the private placement, continues to exhibit emotional needs in the educational environment. While these needs are not as debilitating as in 2010, there is little room for doubt that the student requires special education and related services to address those needs. Most importantly, the evidence in the record to support such conclusions was either available to the District and misinterpreted, or was not pursued/developed through the District's evaluation process.

Accordingly, the District's evaluation process in spring 2012 and March 2012 RR were prejudicially flawed in not continuing to identify the student as having an emotional disturbance.

## Tuition Reimbursement

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 examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated in IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3)).

In the three-step 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; Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982), Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999), M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

In this case, the District's evaluation process in spring 2012 and March 2012 RR were prejudicially flawed in not continuing to identify the student as having an emotional disturbance. The flawed identification led the District to a position where it did not propose an IEP. As such, at the outset of the 2012-2013 school year, the District did not have an IEP in place to guide the student's educational program. (34 C.F.R. §300.323(a)). Therefore, the parent has met the burden at step one of the

Burlington-Carter analysis in showing that the District is not in a position to provide a free appropriate public education to the student.

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 parent has met the burden in showing that the private placement is appropriate. The evidence is not voluminous. But the private placement provides programming that allows the student to make significant academic progress as well as manage emotional support needs in the educational environment. Therefore, the parent has 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, the student's parent will be awarded tuition reimbursement.

## **CONCLUSION**

The student qualifies under the terms of the IDEIA as a student with an emotional disturbance. In failing to identify the student and design a program for the student for the 2012-2013 school year, the District failed in its obligations to the student. The unilateral private placement secured by the parent is appropriate. Therefore, the parent is entitled to tuition reimbursement.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is eligible under the terms of the IDEIA as a student with an emotional disturbance.

The parent is entitled to tuition reimbursement for the 2012-2013 school year.

Upon presentation to the District by the parent of proof of payment to this point in the 2012-2013 school year, payment shall be made within 60 calendar days of the date the parent presents the documentation. The parties shall arrange between themselves how reimbursement shall be made for any unpaid remaining balance for the 2012-2013 school year.

Furthermore, parent is also entitled to reimbursement for mileage for transportation to the private placement, using mileage reimbursement as allowable under Internal Revenue Service mileage reimbursement rates for the period(s) in question. The mileage reimbursement is limited to one round trip, for every school day the student attends in the 2012-2013 school year, from the parent's address to the address of the private school as calculated using an online mapping or directions service. The parties shall arrange between themselves how reimbursement shall be made for the ongoing 2012-2013

school year, for both mileage charges already incurred and mileage charges to be incurred.

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

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

December 18, 2012