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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

6317/05-06 KE

File Number

P.M

Child's Name

Xx/xx/xx

Date of Birth

May 10, 2006

Date of Hearing

Closed

Type of Hearing

For the Student:

Parent(s)

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Date of Hearing: May 10, 2006
Receipt of Transcript: May 17, 2005
Date of Decision: June 1, 2006
Hearing Officer: Daniel J. Myers

For the Bristol Township School District:

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BACKGROUND

Student, (Student) is a [teenaged] resident of the Bristol Township School District (School District) attending a private school. Student's parents seek reimbursement for private school tuition. For the reasons described below, I award tuition reimbursement.

ISSUE

Whether or not Student's parents are entitled to tuition reimbursement for the 2005-2006 school year?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a [teenaged] resident of the School District who has been diagnosed with attention deficit hyperactivity disorder (ADHD) since 4th grade (2001). (JE 7; JE 4; p.2; JE 3, p.2) ¹ Student has been treated for his ADHD with various medications over the years, including Concerta, Ritalin and Adderal. (N.T. 47) A May 2001 memorandum from Student's treating psychologist indicated that, if Student was attending public schools, he would be entitled to Section 504 ² accommodations. (JE 4, p.3; N.T. 23)
2. Student attended public schools in a different school district through 3rd grade. (N.T. 105, 137-138; JE 3, p.2) He then attended a parochial school from 4th through 7th grades, where his classes were relatively small, averaging 15 students in each class. (N.T. 48, 106, 108)
3. During Student's 7th grade year, his family moved residential homes, which angered Student and negatively affected his mood. (JE 3; N.T. 61, 131, 179) Student received mainly Ds and Fs for that school year. (JE 9) Student's parents were dissatisfied with Student's 7th grade parochial school experience when his teacher was unwilling to provide any of the supports or accommodations that had been provided during the previous year. (N.T. 106, 108)
4. In May 2004, toward the end of his 7th grade year, Student was evaluated by the [redacted] County Intermediate Unit, which apparently utilized Sylvan Educational

¹ References to "JE," "SD," and "HO" are to the Joint Exhibits, School District, and Hearing Officer exhibits, respectively. References to "N.T." are to the transcript of the May 10, 2006 hearing session.

² This refers to protections for handicapped students pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794. The federal and state regulations that implement Section 504 are found at 34 C.F.R. Part 104 and 22 Pa. Code Chapter 15, respectively.

Solutions for the evaluation itself. (N.T. 109, 138) Student appeared unmotivated, disinterested and sad during testing. His Wechsler Individual Achievement Test, Second Edition (WIAT-II) results indicated high average scores in reading, and average scores in math, spelling and listening comprehension. Weakness was noted in visual-motor integration. (N.T. 109-111; JE 10)

5. In July and August 2004, Student was privately evaluated by Dr. K, a licensed psychologist and a certified school psychologist. (N.T. 111; JE 3)
 - a. Wechsler Intelligence Scale for Children, 4th edition (WISC-IV) results indicated low average scores in working memory and processing speed, and average scores in verbal comprehension and perceptual reasoning, with an average full scale IQ standard score of 95. (JE 3, p.3) Student's self-report on the Reynolds Adolescent Depression Scale was within normal limits.
 - b. Dr. K noted that Student has average intellectual ability, well developed vocabulary and knowledge base, and he can perform well under structured conditions. She further noted, however, that Student has variable nonverbal reasoning skills, difficulty organizing and integrating complex information, difficulty transitioning to change, and his major academic weakness is in the speed and ease with which he performs tasks. Dr. K also believed that psychiatric issues were interfering with Student's functioning.
 - c. Dr. K recommended that Student receive access to a word process for writing assignments and essay tests, preferential seating, extra processing time, copies of lecture notes, assistance in chunking long range projects, concrete examples for new concepts, an extra set of books at home, and reduced workload in response to his slow processing speed. (JE 3, p.11) She further recommended that Student attend an alternative school with small class size, increased structure and individualized learning support. Specifically, she recommended the [redacted] School (Private School.) (N.T. 115; JE 3, pp.9-10)

6. Student attended Private School for 8th grade, 2004-2005. (N.T. 34)
 - a. Private School is a licensed, private academic school serving approximately 100 students in grades 7-12. (73) It offers a coeducational, college preparatory education to students who are bright but having difficulty in school, often with executive functioning issues. (N.T. 73) Average class size is 11 students, with one teacher. (N.T. 74) All teachers are state-licensed, and all learning support teachers have special education certification. (N.T. 100)
 - b. Annual tuition is \$20,500. (N.T. 102)
 - c. Private School created an Individual Learning Profile (ILP) for Student, which is a written record of Student's needs and accommodations. (JE 11; N.T. 76, 80) In 8th grade, Student received homework support during two class periods per week with a learning specialist and 4-5 total students. (N.T. 80, 85, 101) During this time, Student and his teacher would go over assignments, ensure they were written in Student's assignment book, break large assignments down into smaller

pieces, and generally clean out and organize Student's backpack. (N.T. 80-81)
Student also received direct support in reading and writing. (N.T. 85)

7. Student's parents did not consider enrolling Student into the public schools, nor did they ask the School District to pay for Student's 8th grade Private School tuition. (N.T. 116) Student received Bs and Cs in his core academic classes, except in Algebra in which he received Ds, which are not passing grades at Private School. (JE 11, pp.5, 9; N.T. 92) Student's advisor's 4th quarter comments indicate that Student is a concrete thinker with processing difficulties who benefited from straightforward directions, modified exams and assignments, and extra review and drill. He received two detentions and one suspension during that school year. (JE 11, p.9)
8. In February 2005, Student's parents were concerned about Student's performance at Private School and began discussing public school enrollment with School District officials. They did not explicitly request a Section 504 accommodations plan at that time. Apparently, during that discussion parental description of Student's behaviors suggested to School District officials that Student might be exhibiting symptoms of Asperger's Syndrome. (N.T. 141-142, 154-155, 174-175)
9. On March 30, 2005, Student's treating psychologist since 2001, Dr. A, informed the School District that Student has been diagnosed with ADHD, and has cognitive processing delays, but that he does not have Asperger's Disorder.
 - a. He stated that Student requires considerable external structure, monitoring, 1:1 support, and a smaller class size. (JE 4; N.T. 20) He also noted that Student's previous residential move had resulted in some emotional issues, but Dr. A did not believe that Student's emotional issues were predominant. (N.T. 61-62, 131) Dr. A attributes Student's difficulties with math and reading to his ADHD, and not to any specific learning disability.
 - b. Dr. A recommends small classroom settings, extra support for homework twice per week, and alternative testing procedures at school. (N.T. 34, 42, 50) He further recommends a primary contact person within the school to provide external structured monitoring and organizational support. (N.T. 37-38, 42, 59, 66-67) Noting that Student tends to avoid his difficulties rather than address them directly, Dr. A believes that any school-based services must be required for Student rather than simply made available upon Student's request. (N.T. 44, 54, 57)
10. On May 2, 2005, the School District issued its own evaluation report (ER) that included a review of Student's grades and previous evaluations, as well as interviews with current teachers and classroom observations. The ER also included a Gilliam Asperger's Scale indicating an extremely low probability of Asperger's Syndrome Disorder. The ER concluded that Student did not have a disability, that his achievement levels were on or near grade level, that he is able to perform in the classroom, has responded positively to

instruction throughout his school career, and has adequate school performance despite his ADHD diagnosis. (JE 5, p.5; N.T. 120)

11. On or about June 8, 2005, the School District issued a Notice of Recommended Educational Placement (NOREP) recommending regular education 9th grade for Student. Student's parents rejected the NOREP, believing Student needs to have instructors and advisors working closely with him and providing structure and routine. (N.T. 123) Although Student's parents expressly rejected the NOREP because "no accommodations are offered" School District officials did not perceive this to be a parental request for a Section 504 plan. (JE 5, p.15; N.T. 191-192)
12. In July 2005, Student's parents gave notice to the School District that they intended to enroll Student for another year at Private School, and they intended to seek tuition reimbursement at a due process hearing. (JE 1; N.T. 125, 128-129)
13. On September 7, 2005, the parties participated in a mediation session and agreed that the School District would perform another ER within one month to assess Student's exceptionality and placement. (JE 8; N.T. 126-127)
14. On September 29, 2005, the School District issued another ER that included updated information, updated parent, student and teacher interviews, new WISC-IV and WIAT-II scores, and emotional and behavioral scales.
 - a. The ER observed a discrepancy between ability and achievement in math, but concluded that, because Student's IQ score in math calculation was at the top of the average range, Student's poor math achievement was more likely a result of lack of interest and inconsistent teaching rather than a specific learning disability in math. (JE 6; N.T. 203-204, 236)
 - b. The psychologist performing the ER discounted Student's ADHD as having any negative impact upon Student's education, because she noted that Student's grades for his first 6 years were As and Bs. She observed that Student's grades did not drop until his 7th grade year, and she attributed this to Student's emotional reaction to the family's residential move. (N.T. 179-180, 210-211, 218, 236)
 - c. A typographical error exists in Joint Exhibit 6, suggesting that the September 2005 ER mistakenly considered Student's 7th grade parochial school grades to be "mostly As and Bs." The corrected version of this ER indicates that those grades were "mostly Cs, Ds and Fs." (SD 1)
 - d. Inexplicably, the September 2005 ER does not contain Student's 2004-2005 8th grade Private School grades. (N.T. 234)
15. On February 16, 2006, Student's parents requested a due process hearing, seeking tuition reimbursement for 2005-2006. (JE 2; N.T. 126)

16. Student's Private School March 2006 report card indicates improvement in history, math and English literature. (N.T. 88-92; JE 11)
17. I conducted a hearing on May 10, 2006. Joint Exhibits 1-12 were admitted into the record. (N.T. 252) School District Exhibit 1 was admitted into the record. (N.T. 253) The parties stipulated that the School District will provide a Section 504 plan for Student for the upcoming 2006-2007 school year. (N.T. 150) For purposes of this tuition reimbursement claim, however, the School District defends its June 8, 2005 NOREP. (JE 6; N.T. 150)
18. The parties' experts agree that Student does not have a specific learning disability. (N.T. 37) The parties disagree, however, over whether or not Student should have been offered a Section 504 plan of accommodations for the 2005-2006 school year.
19. The School District contends that all of the accommodations to which Student would be entitled in a Section 504 plan are already available to all regular education students. (N.T. 196)
 - a. More specifically, the School District offers after school tutoring services to all of its students, during which the tutoring staff would get to know Student and go over his daily needs. (N.T. 134, 157, 160, 195)
 - b. In addition, the School District offers classes for regular education students in which regular and special education teachers co-teach English and Social Studies together, with class sizes in the low 20s. (N.T. 157-159, 163, 184, 195)
 - c. All School District teachers recognize and accommodate the needs of students (and not just special education students) for additional time on tests and assignments. (N.T. 165)
 - d. All parent/School District program meetings are memorialized with a memo to file which, allegedly, is similar to a written Section 504 plan. (N.T. 187-188)
 - e. Finally, even if Student had entered the 2005-2006 school year as a regular education student with no IEP or Section 504 plan, the School District would have ensured that the parties met again a couple of weeks after school started to review Student's progress. (N.T. 167, 172)
20. Student's parents, on the other hand, believe Student needs more than just voluntary tutoring opportunities. (N.T. 134-135) They believe Student needs a small nurturing community where he can know, trust, and engage with the adults in charge, and where he will be unable to hide. (N.T. 84, 96) They also want the guarantees that Section 504 provides for parent involvement in devising Student's educational plan, notice of that plan to teachers, and mandatory implementation of the plan. (N.T. 185-186)
21. This decision is issued 105 days after the due process hearing request was filed and 15 days after the record was closed.

DISCUSSION

To be eligible for services under Section 504, Student must have a physical or mental impairment that substantially limits one or more major life activities. 34 CFR § 104.3(j)(1) I conclude that Student's ADHD has a substantial impact upon Student's ability to learn, which is a major life activity. 34 CFR §104.3(j) (2) (ii)

The School District's psychologist who wrote the September 2005 ER did not believe that Student's ADHD had any negative impact upon his education, and she observed that Student's poor math achievement was more likely a result of lack of interest and inconsistent teaching rather than a specific learning disability in math. (JE 6; N.T. 203-204, 236) Noting that Student's grades for his first 6 years were As and Bs and that Student's grades did not drop until his 7th grade year, the School District's psychologist attributed Student's negative academic performance to his emotional reaction to the family's residential move. (N.T. 179-180, 210-211, 218, 236) On the other hand, Student points to his experts, Drs. K and A, to establish that Student's ADHD does have a substantial impact upon Student's ability to learn, which is a major life activity. On this issue, I find Student's evidence to be more credible than the School District's.

The Student's expert opinions are reasonable and supported by evidence in the record. Student has been diagnosed with attention deficit hyperactivity disorder (ADHD) since 4th grade and Dr. A, who has been Student's treating psychologist since 2001, attributes Student's difficulties with math and reading to his ADHD. (JE 4; N.T. 20; 61-62, 131) In summer 2004, Dr. K recommended that Student receive accommodations in response to his slow processing speed, and she further recommended that Student attend an alternative school with small class size, increased structure and individualized learning support. (N.T. 115; JE 3, pp.9-10) Further, the School District's September 2005 ER, while comprehensive, is based upon a much less thorough understanding of Student than Dr. A has, and is inexplicably incomplete by not containing Student's 2004-2005 8th grade Private School grades. (N.T. 234) Thus, where I must choose between Student's evidence and the School District's evidence in determining whether or not Student's ADHD substantially impairs his learning, the preponderance of the evidence favors Student.

There is no substantive distinction between Section 504's prohibition against discrimination on the basis of handicap and a School District's affirmative duty under the Individuals with Disabilities Education Improvement Act (IDEIA) to assure that eligible students with disabilities receive a free and appropriate public education (FAPE). Ridgewood Board of Education v N.E., 172 F.3d 238 (3rd Cir. 1999) In fact, when a school district provides services under IDEIA to an eligible student, it fulfills its Section 504 obligation. 34 CFR §104.22(b)(2)

Similarly, private school tuition reimbursement is an available remedy in both IDEIA and Section 504 cases. Borough of Palmyra Board of Education v. F.C., 2 F. Supp 2d 737 (D.N.J. 1998) In determining whether or not to award tuition reimbursement in this case, I will apply

the typical three-step tuition reimbursement analysis, i.e., Student's parents shall be reimbursed for their unilateral placement of Student at Private School if (1) the School District has failed to offer an appropriate program; (2) the unilateral placement is appropriate; and, (3) the balance of the equities favors the unilateral parents' placement. Florence County School District v. Carter, 510 U.S. 10 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); In Re the Educational Assignment of K.G., Spec. Ed. Op. No. 1450 (2003)

In this case, the School District's June 8, 2005, NOREP recommended regular education 9th grade for Student. (JE 5, p.15; N.T. 191-192) Further, the School District contends that all of the accommodations to which Student would be entitled in a Section 504 plan are already available to all regular education students. (N.T. 196) Essentially, then, the School District recognizes that Student needs significant accommodations in order to succeed academically and it is willing to provide those accommodations, as long as they are not called "Section 504 accommodations."

I believe that the School District can, and will, provide Student with the accommodations that he needs for academic success. I agree with Student's parents, however, that Student is entitled to the guarantees that Section 504 provides – guarantees of parent involvement in devising Student's educational plan, notice of that plan to teachers, and mandatory implementation of the plan. (N.T. 185-186) In other words, the School District's failure to offer to Student a Section 504 plan in June 2005, regardless whether or not the same accommodations would have been available to any regular education student, constitutes a failure to offer FAPE to Student. Thus, the first step of the Burlington-Carter reimbursement test is met.

In addition, Private School was an appropriate unilateral placement for Student in response to the School District's failure to offer FAPE for 2005-2006. (N.T. 34) Private School is a small, licensed, private academic school serving students who have difficulty in school, often with executive functioning issues. (N.T. 73) Average class size is 11 students, with one teacher. (N.T. 74) All teachers are state-licensed, and all learning support teachers have special education certification. (N.T. 100) Student received homework support during two class periods per week with a learning specialist and 4-5 total students, during which time, Student and his teacher would go over assignments, ensure they were written in Student's assignment book, break large assignments down into smaller pieces, and generally clean out and organize Student's backpack. (N.T. 80-81, 85, 101) Student also received direct support in reading and writing. (N.T. 85) These accommodations provided by Private School addressed Student's disability-related deficits. Accordingly, the second step of the Burlington-Carter reimbursement test is met.

With respect to weighing of the equities, Student's parents attended and cooperated fully in all of the School District evaluations and IEP meetings. There was plenty of evidence provided by Student's parents upon which the School District could have based an offer of FAPE. Student's parents did not prevent the School District from performing its duties. Overall, the equities weigh in favor of Student's parents for tuition reimbursement purposes.

Accordingly, I conclude that the third step of the Burlington-Carter reimbursement test is met, and that Student's parents are entitled to reimbursement for Private School tuition.

CONCLUSION

Student's request for relief is limited to tuition reimbursement for the 2005-2006 school year. During that time, the School District offered a NOREP recommending a regular education placement with no IEP or Section 504 plan. I have concluded, however, that the NOREP constitutes a denial of FAPE because a preponderance of evidence establishes that Student's ADHD has a substantial impact upon his ability to learn, affecting a major life activity and entitling Student to a Section 504 plan. In addition, for tuition reimbursement purposes, Student's unilateral placement at Private School was appropriate, and the equities weigh in Student's favor. Thus, I will award tuition reimbursement for the 2005-2006 school year.

ORDER

For the reasons described above, I ORDER that Student's parents are entitled to reimbursement of tuition at the [Private] School for the 2005-2006 school year.

Daniel J. Myers

Hearing Officer

June 1, 2006

Re: Due Process Hearing
File Number 6317/05-06 KE