

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.

Decision

Due Process Hearing for L.V.
Date of Birth: [redacted]
File Number: 6721/05-06

Dates of Hearings:
August 14, 2006; September 13, 2006

CLOSED HEARING

Parties:
Parent[s]

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Date Transcript Received:
Date Closing Response Received:
Date of Decision:
Hearing Officer:

September 20, 2006
October 16, 2006
October 27, 2006
David F. Bateman, PhD

I. BACKGROUND

[Student] is [a late-teenaged] resident of the Colonial School District (hereinafter District) eligible for special education and related services as a student with a learning disability and emotional disturbance. During the 2004-2005 school year [Student] attended private placements as a result of a settlement agreement. That settlement agreement provided for a waiver of all claims from June 4, 2003 to June 30, 2005. The Parents requested the present Hearing seeking tuition reimbursement for the time period of July 1, 2005 through July 31, 2005 at the [redacted] School and compensatory education for a denial of a free appropriate public education for the 2005-2006 school year.

In August 2005 the Parents told the District they were enrolling [Student] in a private placement for the 2005-2006 school year, and [Student] did not receive educational services (other than tutoring) from the District for the period in question, nor was an IEP offered. The Parents contend [Student] is due compensatory education due to a lack of an IEP, and the District alleges the Parents failed to establish a legal basis for their claims and that no relief is warranted.

II. ISSUES PRESENTED

Is [Student] eligible for tuition reimbursement for the period of July 1, 2005 to July 31, 2005 to the [redacted] School?

Is [Student] due compensatory education for denial of a free appropriate public education for the 2005-2006 school year?

III. FINDINGS OF FACT¹

A. Background

1. [Student] was born on [redacted]. [Student] is currently [late-teenaged] (S-1, p. 1).
2. [Student] is an eligible student as a result of [Student's] classification of emotional disturbance (NT 25).
3. On January 15, 2003 the Parents signed an IEP meeting waiver (P-1).
4. The District agreed on May 14, 2003 to pay \$30,000 tuition for [Student] to attend the [redacted] Program (S-2).
5. A settlement agreement was forwarded to the Parents on May 20, 2003 (S-4, p. 1). The settlement agreement waived all claims through June 30, 2005 (S-4, p. 9) and provided for \$30,000 for the education and related services for

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents' evidentiary exhibits will be designated "P" followed by the relevant exhibit number.

[Student] to attend the [redacted] Program. The settlement agreement also states the parties agree that prior to the end of August 2005, unless otherwise mutually agreed by the parties, the District will conduct a re-evaluation of the student in accordance with Pennsylvania regulations (S-4, p. 8). The settlement agreement goes on to state the District and the Parents shall meet as an IEP team to develop an IEP for the 2005-2006 school year within the District. The IEP team meeting shall occur by the end of August, 2005, or sooner if the student no longer attends the [redacted] Program, or other similar facility to private placement through June 30, 2005, but no later than August 31, 2005, unless otherwise mutually agreed by the parties (S-4, p. 8).

6. A summary of testing completed by the District was provided to the Parents on June 4, 2004 (S-5). The purpose of the testing was to provide updated intellectual and academic testing for the Parents as they were looking for a new school for [Student]. The summary indicates a student with a history of significant cognitive, emotional, learning and behavioral difficulties (S-5, p. 4).
7. On August 12, 2004 the Parents sought additional assistance from the District during the time period of the settlement agreement due their difficulty in finding an appropriate educational placement for [Student] (S-6). As a part of their request to the District they provided a financial breakdown of the costs at the [redacted] School (S-6, p. 3).
8. On October 4, 2004 the District agree to modify the terms of the settlement agreement to pay for [Student] at the [redacted] School in [redacted] (S-7).

9. The [redacted] School provided progress reports to the Parents regarding [Student]. The progress reports were provided to the District on May 4, 2005 (S-8). The progress reports cover a time period of March 2005-April 2005. The reports indicate a student who has mood swings but is making progress on building [Student] self-confidence, with grades of A's and B's.
10. The grade reports from the [redacted] School that were provided May 2, 2005 indicate [Student]'s grades at the end of [Student's] year were all A's and B's (P-2).
11. On May 20, 2005 the District sent a letter to the [redacted] School seeking information for a discharge summary for [Student] (S-9).
12. On June 21, 2005 the [redacted] School sent a list of recommendations to the District that included: a small school environment with small class sizes, information presented using a multi-sensory approach, concrete materials and manipulatives, frequent checks for understanding, context provided when learning new material, adjustment in length of assignments, and daily/weekly progress charts (S-10).
13. A meeting was held with the Parents and the District on August 10, 2005. The summary indicates the Parents intend to enroll [Student] in the [redacted] High School, a private parochial school (S-11). The District also stated it would schedule an evaluation and subsequent IEP meeting and recommend a placement if the Parents wanted [Student] to return to the District.

14. The discharge summary from the [redacted] School released on August 15, 2005 indicates [Student] made progress in individual therapy, group therapy, family therapy, academics, and recreational therapy (P-3).
15. The Parents sent a letter to the District on September 2, 2005 stating they were hopeful, yet a little pessimistic, that [Student] will be able to perform at the [redacted] High School. They also requested assistance in obtaining after school tutoring services for [Student] (S-13).
16. A meeting was held on September 16, 2005 regarding the request for tutoring by the Parents. Notes from the meeting indicate the District will provide two hours/week of tutoring for [Student] (S-14).
17. On November 17, 2005 the District sent an authorization for release of information to the Parents. The Parents signed the authorization on November 24, 2005 (S-15).
18. On December 13, 2005 the District sent a letter to [redacted] Alternative School for possible placement (S-16).
19. The parents filed for a due process hearing on December 22, 2005 (S-1). The filing claims substantive disagreements have arisen with the respect to the educational program and placement of [Student]. The Parents also sought an independent educational evaluation.
20. On January 12, 2006 the District's counsel sent a letter to Parent's counsel regarding a reevaluation (S-17).

21. The District completed a reevaluation report (RR) on April 27, 2006 (S-20). The RR found [Student] had a disability and needed specially designed instruction (S-20, p. 7).
22. As the parties were addressing the issues in the Parents due process request, hearings were scheduled and continued for February 6, 2006, March 16, 2006, May 18, 2006, May 23, 2006, and May 25, 2006. The initial due process hearing was withdrawn on June 9, 2006 because of a settlement (S-1, p. 10).
23. The Parents filed for the present due process hearing on June 28, 2006 (S-1, p. 11).

IV. DISCUSSION AND CONCLUSION OF THE LAW

A Due Process Hearing was requested because [Student]'s Parents are seeking the following relief for their child: tuition reimbursement for the time period of July 1, 2005 through July 31, 2005 at the [redacted] School and denial of a free appropriate public education for the 2005-2006 school year. The District maintains that it did not develop an evaluation report and IEP for [Student] for the 2005-2006 school year because the Parents enrolled [Student] in a private placement, and therefore has at all times satisfied the substantive and procedural requirements of the IDEA and Pennsylvania special education law with regard to the provision of special education and related services to [Student], and that there are no legal grounds to justify the relief sought by the Parent in this proceeding.

[Student]'s Educational Placement

Parents Request for Reimbursement to the Heritage School

Under the two-part test for private school reimbursement established by the Supreme Court, the school district must establish the appropriateness of the education it provided to the student.² If the school district is unable to establish the appropriateness of its own educational program, the burden then shifts to the parents to prove that the private school selected for their child did provide an appropriate education. See *Burlington School Committee v. Massachusetts Department of*

² This Hearing occurred after *Schaffer v. Weast*, 126 S.Ct. 528, and the Parents had the burden of demonstrating the District's program was inappropriate.

Education, 471 U.S. 379 (1985).³

As *Rowley* principles have been applied in the context of private placements, a disabled child is “not . . . entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.” See *Board of Education v. Rowley*, 458 U.S. 176, 189 (1982) and *Abrahamson v. Hirschman*, 701 F.2d 223, 227 (1st Cir. 1983). In making a determination regarding a school district’s obligation to pay for private placement, a court must make the following inquiries:

First, the court must ask whether the district’s IEP was reasonably calculated to confer an educational benefit on the student. If the court determines that the IEP was not so calculated, the court must then ask whether the parents’ unilateral choice to place a student in a residential setting is the appropriate educational choice for the student. If the answer to the second inquiry is yes, then the parents would be entitled to reimbursement from the school district for the cost of the placement.

Hall at 1527. (citations omitted).

Importantly, in gauging the appropriateness of the District’s actions toward [Student], any IEP must be judged as to its appropriateness at the time that it is written, and not with respect to subsequently obtained information about the student. The ideas that “an IEP is a snapshot, not a retrospective,” and that the IEP must take into account what was objectively reasonable at the time that the IEP was drafted were recognized by the First Circuit in *Roland M.*, supra, and have been adopted in the Third Circuit. See, e.g. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir.

³ Later, in *Florence County Sch. Dist. v. Carter*, 114 S.Ct. 361 (1993), the Supreme Court reaffirmed the test for private school tuition reimbursement established in *Burlington*, and added that private school placements selected by parents need not be at facilities which are approved by state departments of education for the provision of education to students with disabilities.

1995); *Fuhrmann v. East Hanover Board of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993). See also *Philadelphia School District*, 22 IDELR 825, 826 (SEA PA 1995).

It is true that school districts have been required to pay for the educational components of private placements even in cases where the students require those placements solely for medical reasons when the school district's own educational programming for the student is deemed deficient. See *Board of Education of Oak Park and River Forest High School v. Illinois State Board of Education*, 29 IDELR 52 (N.D. Ill 1998), (Where student's need for private placement was primarily for non-educational reasons, district court limited parents' claim for reimbursement to the educational component of the private placement given that the school district's educational provisions for the student were inappropriate, and the academic program the student received at the school was appropriate). However, the evidence presented by the District in this case clearly establishes that it was not aware the Parents were requesting tuition reimbursement until well after the placement was over.

[Student] attended the [redacted] School during the 2004-2005 school year. The District and the Parents had entered into a settlement agreement that waived all claims up to and including June 30, 2005 (FF:5). [Student] was enrolled at the [redacted] School when the settlement agreement claim period expired. [Student] then stayed another month (NT 323), for which the Parents are now seeking reimbursement.

The first prong of the *Burlington-Carter* analysis is easy; there was no IEP in place from the District. As noted above, if the school district is unable to establish the appropriateness of its own educational program, the burden then shifts to the

parents to prove that the private school selected for their child did provide an appropriate education. There was no evidence or testimony provided to the Hearing Officer the program offered by the [redacted] School was appropriate. Therefore, there is no opportunity to determine its appropriateness for [Student] given the lack of information regarding the [redacted] School.

Additionally, reimbursement is not due because of a balance of the equities. The Federal Regulations state:

§300.148 Placement of children by parents when FAPE is at issue.

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied--

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

There is no evidence or testimony put forward demonstrating the Parents provided notice to the District they were seeking reimbursement for tuition to the [redacted] School for the month of July 1, 2005 through July 31, 2005 prior to the initiation of a due process hearing.

Finally, there was no evidence placed on the record or admitted into exhibits indicating the Parents actually paid the tuition for which they are seeking reimbursement. We have evidence of the monthly costs due to records provided by the Parents to the District (FF:7), but no evidence it was paid for the month in question.

Therefore, the claim the Parents make for tuition reimbursement for July 1, 2005 to July 25, 2005 cannot be supported.

Parents Claim for Compensatory Education

Parents make a claim for compensatory education. Compensatory education may be an appropriate equitable remedy only when the responsible educational authority has failed to provide a child with a disability with an appropriate education as required by the IDEA. The purpose of compensatory education is to replace lost educational services. *See Todd v. Andrews*, 933 F.2d 1576 (11th Cir. 1991). *See also Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); (An IDEA eligible student is entitled to an award of compensatory education only if FAPE is denied by the school district); and *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996).

In this instance, the Parents are claiming a need for compensatory education due to a denial of FAPE for the 2005-2006 school year. Specifically, they point out there was no IEP, evaluation report, or NOREP offered to the Parents prior to the beginning of the 2005-2006 school year. On August 10, 2005 there was a meeting between the Parents and representatives of the District (NT 39). This was not an IEP meeting (NT 39). It is clear no placement was offered by the District to the Parents (NT 40). But it is also clear that on August 10, 2005 the Parents told the District they would be enrolling [Student] in a private placement, [redacted] High School (NT 42, 47-49). [Student] then attended [redacted] High School from September 8, 2005 to November 23, 2005 (NT 277-278) and did not seek to attend the District during the 2005-2006 school year.

The facts in this case are similar to the facts in a recent Appeals Panel Decision, *In re the Educational Assignment of P.P., a Student in the West Chester Area School District*, SEA 1757, August 17, 2006. In that decision the Appeals Panel point out:

compensatory education is a retrospective and in kind remedy for failure to provide as appropriate education for a specific period of time; that being the time for which the Student was denied FAPE. But, children placed in private schools by their parents have no individual right to special education and related services that the child would receive if enrolled in a public school. *See* 34 CFR §§ 300.454 and 300.455

It goes on to state further:

Therefore, because the student was enrolled in a private school, and not in the District, and because the clear testimony indicates that even if the District had completed the evaluation in a timely manner, the Student would have remained in the private school leads this panel to the conclusion that compensatory education is not available. Therefore, the award of compensatory education is reversed.

The Appeals Panel goes further in its analysis of tuition reimbursement, but the analogies are very important here:

It is not the intent of the Parents but rather the Parents' actions that are in evidence that triggers the result that tuition reimbursement is denied. The Parents committed to the PS before the IEP was due from the District, the Hearing Officer determined that the ER and the IEP produced by the District were substantively appropriate. The Parents rushed into a decision about the PS well before the time that, under lawful timelines, the District was required to complete an ER and offer an IEP. In order to expect any award of reimbursement, the Parents needed to wait for the ER and IEP to first determine if the ER and IEP were inappropriate; they did not do that. Instead they jumped the gun. By doing so, the Parents negated their claim to tuition reimbursement. Parents assumed the risk when they chose to enroll

Student in the private school before they had any information about the District's plan for the Student.

The Parents in the present case clearly made the District aware it was placing [Student] in a private placement as noted above. At no point during the year did the Parents seek to reenroll [Student] back in the District. The District and the Parents did discuss various options in case the [redacted] placement did not work out (NT 42, 49, 52, 53, 82-84, 100, 127, 162). The Parents sought help in arranging the visitations (S-13), which was provided. Like the facts in the above mentioned appeals panel decision, the Parents did not enroll [Student] in the District, in fact telling the District they were to enroll [Student] in a private placement.

Did the District violate the settlement agreement in not evaluating [Student] and providing [Student] NOREP? There is no doubt the District did not evaluate [Student], did not develop an IEP, or a NOREP before the deadline imposed by the settlement agreement. However, the Parents made it clear they were going to enroll [Student] in a private placement. Districts are not required to develop an IEP for a student when the student is attending a private school.⁴ Therefore, they may not have implemented the settlement agreement but [Student] is not due compensatory education due to [Student] enrollment in the private placement.

⁴ *In re: G.R. v. Penn Delco, PA SEA 1301*, and *In re: M.F. v. William Penn, PA SEA 1372*.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that it is ordered that the District is not obligated to pay for tuition to the [redacted] School for July 1, 2005 to July 31, 2005. Additionally, [Student] is not due compensatory education for the 2005-2006 school year.

Date

Hearing Officer