PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

File Number: 6972/06-07 KE
Child's Name: RB
Date of Birth: xx/xx/xx
School District: Eastern Lancaster County

Type of Hearing: Closed

For the Student:

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Due Process Hearing Request Date:	September 18, 2006
Mandatory Resolution Meeting Date:	Waived
Hearing Dates:	November 7, December 5, 6, 7, 2006
Date Record Closed:	January 5, 2007
Date of Decision:	January 19, 2007
Hearing Officer:	Daniel J. Myers

Background

Student is a xx year old resident of the Eastern Lancaster County School District (School District) with multiple disabilities, including autism and mental retardation. In May 2006, Student's parents and the School District executed a settlement agreement agreeing, among other things, to educate Student in the local public schools pursuant to a March 27, 2006 IEP until such time as a particularly-funded vacancy became available at the [redacted] School (hereinafter Private School.) [1] In August 2006, Student's parents unilaterally enrolled Student into the Private School even though the particularly-funded vacancy had not yet become available. Student's parents now seek reimbursement of their Private School tuition. For the reasons described below, I find for the School District.

Issues

- Whether or not the School District's proposed program and placement is appropriate; and

- Whether or not Student's parents are entitled to reimbursement for private school tuition and transportation to the school.

Findings of Fact

1. Student, whose date of birth is xx/xx/xx, is a xx year old resident of the School District who has been diagnosed with autism and mental retardation. (N.T. 141, 144)
    a. He has some receptive language skills and virtually no expressive language skills. Receptively, he understands his name and simple questions; expressively, he does not speak but he will wave a book if he wants his parent to read to him and he will stand in front of the refrigerator if he is thirsty. (N.T. 155-156)
    b. Student has no safety awareness skills.
    c. He is not independent in any area of daily living. (N.T. 136, 208) Until this school year, his bladder and bowel control at home has been intermittent. (N.T. 63, 143, 233-234)
    d. Student demonstrates low motivation or lack of initiation to participate in activities. (N.T. 53, 58, 98, 124, 142)

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[1] The placement is interchangeably referred to in the record and in this decision as an "APS" placement, a "4010" placement (apparently referring to the Pennsylvania Department of Education [PDE] Form No. 4010 that is used for state approval,) and a "60/40" placement (referring to the 60% and 40% budget allocation percentages applied by PDE [which actually pays for the entire placement] to the state's special education account and to the School District's education subsidy account.)

e. Student's problematic behaviors include tantrumming, head-banging, dropping to the floor, and pushing his thumbs into his eyes. (N.T. 143; J1, p.13) He often cups, holds, pulls or bends his ears, the function of which behavior is unknown. (J40; N.T. 240, 666, 1068)

2. During the 2005-2006 school year, Student attended a public middle school full-time autistic support classroom operated by [redacted – a public entity] That classroom contained four students and five adults. (N.T. 549) In the beginning of the school year, Student tantrummed occasionally, crying, flailing, jerking his head back and forth, and pushing his thumbs into his eyes. (N.T. 341) During the second half of the school year, however, Student rarely tantrummed and he was very compliant at school. (J1; J2; N.T. 340-342, 469-470, 960, 995, 1066-1067)

3. Exhibit J38 is a video of Student and a teacher engaging in instructional activities on several separate, unspecified dates and times. In the video, Student was patient, compliant, occasionally laughing, and appeared to be answering questions correctly. (J38)

4. In addition to specially designed instruction and related services received at school, Student also received wraparound therapeutic support staff (TSS) and behavioral specialist consultation (BSC) services from mental health/mental retardation (MH/MR) agencies. (N.T. 156, 161, 227, 233-234)

5. During the 2005-2006 school year, Student's behaviors were more difficult at home than at school, and his parents became increasingly concerned about ensuring Student's safety as he got older and larger. Although Student's behavior improved at school, at home he engaged in two tantrums per week from December 2005 through March 2006, either crying or behaving in a manic way, sometimes spitting, sometimes pulling down his pants and urinating. (N.T. 169, 233-234)

6. Exhibit J40 is a video of Student's problematic home behaviors. (J40; N.T. 162, 166, 237) The 1.5 hours long DVD comprises approximately five separate, unspecified dates and times around November 2005, when Student engaged in tantrumming at home. Some of the tantrums lasted 10 minutes, others exceeded 30 minutes. Student typically remained in a single location, crying or whining loudly, placing his hands over his ears, occasionally kicking or flailing his elbows forcefully and unexpectedly. Occasionally, even while Student continued to whine and cry, he would wave a book to signal that he wanted his parent to read to him, or he would select a toy or book from a basket, or he would allow his parent to dress him, or he would stand up to permit an adult to place cushions back onto the couch. During all tantrums on the video, adults remained nearby, asking Student repeatedly what he wanted, moving him back onto a couch when he fell off, and keeping Student safe. (J40)

7. During Fall 2005, Pennsylvania Child and Adolescent Service System Program (CASSP) meetings were conducted to consider residential placements for Student. Student's parents were disappointed with the CASSP's MH/MR approved locations for residential placements, however, which they considered to be not nearly as acceptable as approved public schools (APS.) (N.T. 244-245)

8. In December 2005, Student's Parents privately secured an evaluation by Dr. S to evaluate Student's current programming and his need for educational and behavior modification services. (N.T. 176; J1) Dr. S is a licensed psychologist, Board-certified behavior analyst (BCBA), associate professor in psychology and coordinator of the Penn State University applied behavior analysis (ABA) program. (N.T. 615, 618-619)
    a. Dr. S reviewed Student's medical and educational records, observed video disks of Student's tantrums, interviewed parents and teachers, and observed Student at home and school. (J1) She observed tantrums at home, but not at school. (J1, p.33) She also observed substantial leisure time during Student's school day, during which Student was not learning or practicing skills. (N.T. 655)
    b. Dr. S recommended a comprehensive functional behavior analysis (FBA) and a cohesive ABA treatment plan developed by either a renowned expert such as Dr. F or personnel at a residential facility such as [redacted]. (J1, p.34) She also recommended that, in developing goals, Student's IEP team conduct very detailed task analyses that concentrate on extremely minute skill acquisition. (J1, p.35; N.T. 673) She recommended teaching for generalization, and she recommended consistency of techniques, prompts, commands and stimuli across all environments. (J1, p.35) Although Dr. S recommended that any plan be implemented 24 hours per day, she did not explicitly recommend a residential school. (J1; N.T. 711)

9. In February 2006, the School District contracted with Dr. C for an outpatient behavioral evaluation to determine whether Student's behaviors permitted education in his current school or in a more restrictive, residential educational environment. (J3, p.3; N.T. 184, 187, 851, 871-874) Dr. C is an assistant professor of special education for Penn State University with 15 years experience in ABA and functional behavioral analysis. (N.T. 775, 777, 779)
    a. Dr. C conducted two evaluations, one at school and one at home, which he called brief functional analyses (BFAs.) During the BFAs, Dr. C set up specific test situations and observed Student's reactions to those test situations in order to determine the function of Student's reactions. (N.T. 783-784) Dr. C testified that BFAs are successful in analyzing the functions of behavior 2/3 of the time. (N.T. 856)
    b. During the school-based BFA, Student engaged in no problematic behavior, which prevented Dr. C from reaching any conclusions regarding the function of Student's reported behaviors. (J3, p.4; N.T. 792) During the home-based BFA, Dr. C observed some significant behaviors at home,

but they did not rise to the level of past reports. Dr. C was unable to reach any conclusions regarding the function of Student's behaviors at home because of the inconsistent pattern of Student's behaviors – no real pattern of behaviors emerged. (J1, p.6; N.T. 800)

c. Interviews with Student's care providers suggested to Dr. C that Student's behaviors were not sensory-based, but rather that they may have served the functions of escaping/avoiding demands and/or seeking access to preferred items. (J3, p.10)
d. Dr. C recommended differential reinforcement of alternative behavior (DRA); functional communication training; an augmentative communication evaluation; a toileting procedure; and continued functional analysis. (J3, pp.16-20) He did not recommend a residential school because he did not observe behaviors that would warrant such a placement. (J3, pp.17-18; N.T. 857)

10. On March 6, 2006, the School District issued a reevaluation report (ER.) (J5) It reviewed assessments of academic skills, an Assessment of Basic Language and Learning Skills (ABLLS), occupational therapy (OT) status, a report from Student's speech and language (S&L) therapist, a parental adaptive behavior scale, and Dr. C's report. The ER concluded that Student continues to need OT, S&L therapy, physical therapy, a focus on functional academics and daily living skills, ABA strategies, a structured environment and predictable routine. (J5, p.12)

11. On March 27, 2006, the School District offered a new IEP.
    a. This IEP included a behavior plan to address the single problematic behavior that Student was displaying in school, i.e., foot stomping. (J6; J7; N.T. 156, 329-332)
    b. The IEP's S&L goals are found at Exhibit J41, and the School District's S&L teacher does not know why those goals are not also found in Exhibit J7. (N.T. 1157-1159)

12. The parties disagreed over the appropriateness of the proposed March 27, 2006 IEP. They also disagreed over whether or not Student had been receiving a free and appropriate public education (FAPE.)
    a. In May 2006, in lieu of a due process hearing, however, the parties entered into a settlement agreement. (J9; N.T. 553)
    b. Both Student and the School District were represented by lawyers at the time they reached their settlement agreement. (N.T. 191; J9)
    c. The parties agreed that:
        i. Upon notification by Private School that the Student has been accepted into a 60/40 APS placement, the School District shall reconvene the IEP team to revise the IEP to reflect such a placement. (J9, pp.2-3; N.T. 190-191)

ii. The March 27, 2006 IEP (including weekly consultation by Dr. F) is an appropriate program for Student until such time as the Private School placement becomes available; (J9, p.2; N.T. 182)
iii. The School District would pay up to $6,100 for Student's attorney's fees; (J9, p.2)
iv. The School District would pay $25,000 to a compensatory education trust fund. (J9, p.3)

13. At or around the time of the May 2006 settlement, Student's parents had been told by a Private School employee, and they so informed the School District, that an APS placement at Private School would very likely be available by the end of May or June. (N.T. 191)

14. Pursuant to the May 2006 settlement agreement, the School District contracted with Dr. F for consultation services.
    a. In May 2006, Dr. F visited Student at his house and spoke to Student's parent on the phone. He then recommended additional consultation by a masters-level BCBA under Dr. F's supervision. (J25; N.T. 343-349)
    b. On or about May 23, 2006, masters-level BCBA consultation under Dr. F's supervision was provided by Mr. I, an IU employee. (N.T. 349, 1061)
        i. Mr. I tested Student to determine what reinforcers Student liked best. (N.T. 196-197)
        ii. Mr. I also developed revised data collection sheets, as well as a daily school schedule for implementing the March 2006 IEP pending Student's APS placement. (J26; J34; N.T.)

15. Pursuant to the May 2006 settlement agreement, the School District requested an augmentative communication assessment from the IU. (N.T. 1160)

16. Student tantrummed minimally in school between the time of his March 27, 2006 IEP and the end of the school year on June 2, 2006. (N.T. 342, 960, 979-983, 1067-1069; J33; J35; J36; J41)

17. In July 2006, Student's parents learned that no APS placements would be available at Private School for a very long time. They also learned, however, that a non-APS residential placement <u>was</u> available immediately at the Private School. (N.T. 204-205; 249-250)

18. On August 22, 2006 Student's parents unilaterally placed Student at the Private School. (N.T. 204-205, 213) They hoped to agree with the School District to split the cost 60/40 between the parents and the School District. (N.T. 204-206, 208; J19)

19. Private School is a large, residential facility with several programs that have been licensed for various purposes by the Pennsylvania Department of Public Welfare as well as by PDE. (N.T. 46, 93)

a. One of Private School's programs – the program that Student is attending – serves children with challenging behaviors, who typically have multiple disabilities, generally mental retardation, plus some type of behavioral or psychiatric need, and many with autism. (N.T. 46)
b. Other Private School programs are for developmentally disabled children without behavioral challenges (N.T. 47); for children without mental retardation who need emotional support (N.T. 47, 50); and for children with brain injuries. (N.T. 47)
c. Private School tuition and costs are $98,835 for six months, or $197,670 per year. (J19)

20. Since August 22, 2006, the Private School has not experienced Student's self-injurious and aggressive behaviors. In fact, Student's IEP at Private School does not contain a behavior plan because he is not presenting problematic behaviors. (N.T. 124)

21. Private School is programming for Student's low motivation and lack of initiative, and it is providing Student with skills to become more functional within his environment. (N.T. 58, 124)
    a. Student's residential and educational programs work on the same goals, with a program specialist/case manager whose responsibilities include ensuring consistency between the programs. (N.T. 59, 61, 78, 106, 710; J23, pp.19-21)
    b. Student has a one-to-one aide at Private School. (N.T. 88)
    c. Student has no typically-developing peers at Private School. (N.T. 123)
    d. Between August and November 2006, Private School completed an augmentative communication assessment as well as a vocational assessment. (N.T. 65, 1262, 1265-1267)

22. Since attending Private School, Student has had three home visits. On those home visits Student no longer tantrums, nor does he soil/wet his bed. (N.T. 210, 213)

23. On or about September 18, 2006, Student's parents requested a due process hearing. (J16) Student's parents complain both that the School District did not comply with its settlement agreement, and that the March 2006 IEP is inappropriate because Student made no meaningful educational progress while he was at the School District between March and August 2006. (J16, pp.3-4)

24. A due process hearing was conducted in this matter on November 7, December 5, 6 and 7, 2006. Joint Exhibits J1 through J42 were admitted into the record. (N.T. 1272) J40, the parents' November 2005 DVD was admitted over the School District's objection. (N.T. 166) The parties were given the opportunity to present written closing statements after receipt of the transcripts. The record was closed on January 5, 2007. (N.T. 1271)

DECISION

Student's parents seek reimbursement for Private School tuition. When a parent unilaterally removes her child from the public school district and places that child in a private school, she may seek tuition reimbursement from the public school district. There are three prongs to the decision to award reimbursement for a unilateral placement of a student at a private school. First, the School District must not have offered Student a free appropriate public education. Second, if the School District has not offered FAPE, Student's parent must establish that the private school is appropriate for Student. Third, if FAPE has not been offered and if the private school is appropriate, I must weigh the equities in the case. Florence County School District 4 v. Shannon Carter, 510 U.S. 7, 126 L.Ed.2d 284, 114 S. Ct. 361 (1993); School Committee of the Town of Burlington, Mass. v. Dept. of Education of Mass., 471 U.S. 359, 105 S. Ct. 1996 (1985)

The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education IEP is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, __ U.S. __, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) Because Student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The U.S. Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., Student's parents) must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast, __ U.S. __, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Board of Education, 435 F.2d 384 (3d Cir. 2006) Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten courts' litigation loads. When the terms of a settlement agreement are relatively clear, and when the parties' decisions to enter into that settlement agreement are neither involuntary nor uninformed, it is contrary to public policy to allow either party to void that settlement agreement when it becomes unpalatable. D.R. v. East Brunswick Board of Education, 109 F.3d 896, 25 IDELR 734 (3d Cir. 1997); In Re B.B. and the West Chester Area School District, Special Education Opinion No. 1484 (2004)

The School District's proposed program and placement is appropriate

To satisfy the first prong of the tuition reimbursement test, Student must establish that the School District did not offer FAPE. FAPE means special education and related services that are provided at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program. Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998) The cornerstone of FAPE analysis is an IEP that need not provide the maximum possible benefit, but must be reasonably calculated to enable the child to achieve meaningful educational benefit. Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 107 S.Ct. 3034 (1983); Ridgewood Board of Education v. M.E. *ex. rel.* M.E., 172 F.3d 238 (3d Cir. 1999) Whether an IEP is reasonably calculated to afford a child meaningful educational benefit can only be determined as of the time it is offered to the student and not at some later date. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002)

The parties agreed that the March 27, 2006 IEP was appropriate

In this case, the parties agreed in paragraph 2 of their May 2006 settlement agreement that, among other things, the School District's March 27, 2006 IEP "is an appropriate program for the Student until such time as an alternative placement… becomes available." (J9) This agreement precludes Student from now arguing that the March 27, 2006 IEP is not appropriate for Student.

Student argues that the settlement agreement does not prevent him from challenging the appropriateness of the March 27, 2006 IEP. He points to paragraph 14 of the Settlement Agreement, which is a waiver of all rights that Student and his parents might have under a number of specific laws "…from the beginning of time through the date of this Agreement…" (J9, p.9) Student argues that this provision means that he is only bound to the stipulation in paragraph 2 from the beginning of time until the date of the agreement itself. The School District acknowledges that paragraph 2 of the settlement agreement should not bind this 14 year old Student to the same IEP forever. The School District reasonably argues, however, that it is troubling to see Student's parents challenge the March 27, 2006 IEP's appropriateness only a few months after the settlement agreement was executed.

The stipulation in paragraph 2 of the agreement contains the statement that "The parents acknowledge and agree that the March 27, 2006 [IEP] is an appropriate program for the Student until such time as an alternative placement…becomes available." (J9, p.2) Under Student's theory, paragraph 14 makes paragraph 2's stipulation binding upon the parties only until the execution date of the settlement agreement. That theory does not make sense, however, because the language of the stipulation is clearly intended to continue for an unspecified time into the future ("until such time as…becomes available.) Such conditional language is unnecessary if the stipulation in paragraph 2 is intended to expire upon execution of the settlement agreement.

What makes more sense is to conclude that the waiver of rights in paragraph 14 is intended to limit Student's ability to raise past claims, but is intended to have no impact at all upon the parties' agreed-upon future obligations and responsibilities – including their stipulation regarding the appropriateness of the March 27, 2006 while they await a 60/40 placement at Private School. Thus, the terms of the settlement agreement itself do not relieve Student from the effect of the parties' agreement that the March 27, 2006 IEP is appropriate.

Student also argues that he is permitted to challenge the appropriateness of the March 27, 2006 IEP because the May 2006 settlement agreement was signed under mutual mistake. Student contends that both parties mistakenly anticipated that an APS placement at Private School would arise by Summer 2006. Student's parents testified that they had been told by a Private School employee, at or around the time of the May 2006 settlement, that an APS placement at Private School would very likely be available by the end of May or June. Student's parents also testified that they had so informed the School District. (N.T. 191) Student contends, without citation to any law, that mutual mistake is a valid reason why the stipulation in paragraph 2 of the settlement agreement is no longer binding upon Student. Assuming that this legal assertion is correct, the record in this case still does not establish there was any mutual mistake by the parties. While there is evidence that incorrect information was shared among the parties, there is no evidence that the School District mistakenly relied upon such information. Thus, the record does not establish the settlement agreement was signed under mutual mistake.

The terms of the May 2006 settlement agreement are relatively clear, and both parties were represented by counsel at the time of the agreement. (N.T. 191; J9) It is contrary to public policy to allow either party to that void settlement agreement when it becomes unpalatable. D.R. v. East Brunswick Board of Education, 109 F.3d 896, 25 IDELR 734 (3d Cir. 1997); In Re B.B. and the West Chester Area School District, Special Education Opinion No. 1484 (2004) Accordingly, I conclude that the settlement agreement precludes Student from arguing in this case that the March 27, 2006 IEP fails to offer an appropriate program. Student, therefore, does not satisfy his burden of proving that the March 27, 2006 IEP was inappropriate.

The March 27, 2006 IEP was appropriate on its own

Even in the absence of the May 2006 settlement agreement, the record would establish that the March 27, 2006 IEP was appropriate, because it was reasonably calculated to enable Student to achieve meaningful educational benefit.

The evidence clearly establishes that Student's behavior was more problematic at home than at school. Although Student tantrummed occasionally at school, it was rare during the second half of the year and he was very compliant at school. (J1; J2; N.T. 340-342, 469-470, 960, 995, 1066-1067) At the same time, however, Student engaged at home in two tantrums per week, either crying or behaving in a manic way, sometimes spitting, sometimes pulling down his pants and urinating. (N.T. 169, 233-234) The two videos of Student's behaviors demonstrate the same home/school dichotomy. (J38; J40;

N.T. 162, 166, 237) Furthermore, both Dr. S and Dr. C observed less problematic behavior at school than at home and, significantly, neither explicitly recommended a residential educational placement. (J1, pp.6, 33; J3, pp.4, 17-18; N.T. 711, 792, 800, 857)

The March 27, 2006 IEP includes a behavior plan to address the single problematic behavior that Student was displaying in school, i.e., foot stomping. (J6; J7; N.T. 156, 329-332) It includes input from Dr. F and his recommended assistant. (J7, p.33-36; N.T. 196-197, 349, 1061, 1170-1172) It includes daily home/school communication with parents, teachers and therapists, as well as functional academics, direct instruction in toileting, hand washing, tooth brushing, and feeding skills assistance using a fading prompt hierarchy, ABA strategies and discrete trial instruction, individualized and small group instruction for generalization, and weekly data graphing. (J7, pp.25-26) Given the clear evidence that Student was a compliant student and exhibited much less problematic behavior at school than at home, the School District's March 27, 2006 was reasonably calculated to enable Student to achieve meaningful educational benefit.

The March 27, 2006 IEP was implemented appropriately

Student also argues that, even if the IEP was appropriate, he was denied FAPE because the IEP was not appropriately implemented. Much of Student's argument regarding inappropriate IEP implementation mixes pre- and post- settlement agreement history. Clearly, however, the May 2006 settlement agreement resolves claims regarding pre-settlement agreement implementation failures. The only relevant evidence regarding inappropriate implementation, therefore, is post-settlement agreement evidence.

The record contains ample evidence that the School District appropriately implemented the March 27, 2006 IEP. This evidence includes daily monitoring sheets and graphs documenting the instruction provided to Student. (J33; J35) The School District communicated with Student's parents daily through a home/school communication log, as required by the IEP. (J27; J7, p.26) A reinforcer assessment was initiated to implement Dr. F's recommendations. (J34) Extended school year services were provided in accordance with the IEP. (J24) While Student's counsel picks apart the effectiveness of individual services and educational techniques, the record on the whole establishes that the School District did, indeed, implement the IEP appropriately.

Thus, Student has failed to satisfy the first prong of the tuition reimbursement test by failing to establish that the School District did not provide FAPE to Student. As described above, both the March 27, 2006 IEP itself, as well as its implementation by the School District, were appropriate.

Private School is not appropriate

Because Student has failed to satisfy the first prong, it is unnecessary to continue the tuition reimbursement analysis. If I were to continue that analysis, however, I would

find that Student failed to establish the second prong of the test because I would not find that Private School is educationally appropriate for Student.

This is not to diminish the concerns of Student's parents in August 2006 when they decided to unilaterally enroll Student in Private School. Even with wraparound TSS and BSC services, Student's difficult home behaviors prompted his parents to become increasingly concerned about ensuring Student's safety as he got older and larger. (N.T. 156, 161, 227, 233-234) Apparently, Pennsylvania's CASSP and MH/MR systems agreed with Parents' concerns, but their recommended residential placements were not nearly as acceptable to Student's parents as approved public schools. (N.T. 244-245) Thus, Student's parents vigorously sought an APS placement and, in May 2006 they secured a settlement agreement from the School District that would, eventually, secure the APS placement that they desired. (J9)

Unfortunately, when a coveted residential vacancy arose at the Private School in August 2006, it did not have the (apparently rare) bureaucratic designation as a "4010" or "60/40" placement that would have triggered the School District's obligations under the May 2006 settlement agreement. (N.T. 204-205; 249-250) In other words, an opening existed at Private School, but not the particularly-funded opening for which the parties had bargained.

Student's parents unilaterally enrolled Student into Private School and they now seek relief under the educational system's criteria for reimbursement of their tuition costs. [2] These reimbursement criteria require that the Private School must be appropriate for Student. Essentially, this means that Student's educational and non-educational needs for Private School's services must be so inextricably intertwined that the residential services must be considered an essential prerequisite for learning. Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981)

Student argues that residential placement at Private School is necessary to meet his overwhelming need for consistent instruction across all settings in behavior, self-care, communication, safety awareness and social skills, similar to the needs of the student in G.B. and the Colonial School District, Special Education Opinion No. 1619 (2005). I reject this argument. The student in Colonial School District exhibited many severe, aggressive, resistive and impulsive behaviors that impeded his educational progress, including biting himself and others, pinching, grabbing, hair pulling, lunging at staff, screaming, crying, whining, dropping to the ground and refusing to sit or walk, removing clothing, and placing into his mouth cleaning spray, moisturizer, white-out, crayons, paste, paint, scissors, plastic screws and foam letters.

While in the extant case, Student's behaviors were more severe at home than at school, and while those home behaviors reasonably concerned not only Student's parents but also, apparently, his MH/MR service providers as well, no educational professionals

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[2] The record does not indicate what, if any, similar relief Student's parents sought from the MH/MR system.

have ever stated that a residential program was an essential prerequisite to Student's learning. Both Dr. S and Dr. C observed less problematic behavior at school than at home and, significantly, neither explicitly recommended a residential educational placement. (J1, pp.6, 33; J3, pp.4, 17-18; N.T. 711, 792, 800, 857)

Under the second prong of the tuition reimbursement analysis, therefore, the evidence in this case simply does not meet the criteria necessary to establish that a full time residential educational program and placement is appropriate for Student. Accordingly, I find that Student does not satisfy the second prong.

The equities favor the School District

The third prong of the tuition reimbursement analysis involves weighing the equities in the case. A review of the record, as well as observation of demeanor of witnesses at the hearing, establishes that all parties have been sincere and forthcoming with each other. Neither party has withheld information from the other nor attempted to obstruct the other in any way.

The record clearly establishes, however, that the parties reached a settlement agreement in which they resolved their Spring 2006 dispute for a sum of money, a promise to send Student to Private School when a "4010" or "60/40" vacancy arose, and a promise to implement the March 27, 2006 IEP in the meantime with consultation by renowned expert Dr. F. The School District has complied with its obligations under the settlement agreement.

Student's parents unilaterally chose not to continue operating under that settlement agreement and unilaterally moved Student out of the public schools. While they certainly have the right to make that decision, Student's parents cannot also claim that the equities now weigh in their favor and that they are now entitled to public reimbursement of their Private School tuition. Thus, I find that the Student has not satisfied the third prong of the tuition reimbursement analysis.

Conclusion

In May 2006, Student's parents and the School District executed a settlement agreement agreeing, among other things, to educate Student in the local public schools pursuant to a March 27, 2006 IEP until such time as a particularly-funded vacancy became available at Private School. In August 2006, Student's parents unilaterally enrolled Student into the Private School even though the particularly-funded vacancy had not yet become available. Student's parents now seek reimbursement of their Private School tuition. For the reasons described above, I find that Student's parents have failed to satisfy any of the three prongs of the three-part tuition reimbursement test. Accordingly, I find for the School District.

ORDER

- The School District's March 27, 2006 proposed program and placement is appropriate;

- Student's parents are not entitled to reimbursement for either private school tuition or transportation to Private School.

Daniel J. Myers
Hearing Officer
January 19, 2007

File Number: 6972/06-07 KE
Child's Name: Student
School District: Eastern Lancaster County