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## **Decision**

Due Process Hearing for AP  
Date of Birth: XX/XX/XX  
File Number: 7159/06-07LS

Date of Hearing:  
January 31, 2007

### **OPEN HEARING**

Parties:

Mr.  
Ms.

Ms. Melanie Sharps  
Delaware county IU/EI program  
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Representative:

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Date Transcript Received:  
Date of Decision:  
Hearing Officer:

February 4, 2007  
February 15, 2007  
David F. Bateman, PhD

## **I. BACKGROUND**

Student is an eligible xx-year old resident of the Delaware County Intermediate Unit (hereinafter Intermediate Unit) with autism. During the 2005-2006 school year, Student attended the placement offered by the Intermediate Unit. For the 2006-2007 school year the Intermediate Unit recommended placement at the [redacted] Head Start program. In September 2006 the Parents informed the Intermediate Unit they wanted to enroll Student in the [redacted] Montessori School. They requested the present Hearing an Order for placement at the Montessori School for the remainder of the 2006-2007 school year.

## **II. ISSUE PRESENTED**

What is the appropriate placement for Student?

## **III. FINDINGS OF FACT<sup>1</sup>**

### **A. Background**

1. Student was born on xx/xx/xx. He is currently xx-years of age (S-33).
2. Student is an eligible student as a result of his label as having autism (NT 16).
3. Student is a resident of the Delaware County Intermediate Unit, residing in [redacted], Pennsylvania (NT 16).
3. The IU completed an reevaluation report on August 10, 2005 (S-33). This evaluation report's focus was a gross motor skills evaluation. The summary of the report states he continues to demonstrate deficits in the areas of social/emotion, speech/language, self-help, and fine motor (S-33, p. 15). Additionally, the report indicated he required occupational therapy.
4. The IU completed an IEP on October 20, 2005 (S-36). This IEP was in place for the 2005-2006 school year. The IU provided services for Student at [redacted] (S-36, p. 15).

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<sup>1</sup> References to notes of testimony will be designated "NT" followed by the relevant page number. References to Intermediate Unit evidentiary exhibits will be designated "S" followed by the relevant exhibit number.

5. Student's classroom for the 2005-2006 school year only had four students (NT 36-37). All students had disabilities, ranging from general developmental delays to autism (NT 37).
6. The IU offered a Notice of Recommended Educational Placement (NOREP) on October 20, 2005 (S-37). This NOREP also added the related service of physical therapy.
7. The IU completed a reevaluation report in July 2006 (S-42). The purpose of the reevaluation was to determine present levels of educational performance for a least restrictive educational placement change (NT 38). The report indicates he made improvements in cognitive levels, social emotional, communication, gross motor, locomotion, object manipulation, and fine motor/visual motor/self-help (S-42, p. 7-8).
8. During the 2005-2006 school year he made gains in his IEP goals, specifically in the areas of social/emotional, communication, and fine-motor (NT 39-40).
9. The IU offered an IEP on August 2, 2006 (S-43). This IEP incorporated the evaluation report of July 2006 and provided a direction for services for the 2006-2007 school year.
10. The IU offered a NOREP on August 3, 2006 (S-44). This NOREP would have provided his education at Head Start in an early childhood environment. The Parent did not approve this recommendation (S-44, p. 3). The IU offered this placement because they described him as ready for a less restrictive placement (NT 41).

11. The Intermediate Unit completed a Child Progress and Planning Report on August 26, 2006. This report indicates he is making progress in his school and meeting his IEP goals and objectives (S-57).

#### **IV. DISCUSSION AND CONCLUSION OF THE LAW**

The Due Process Hearing was requested because Student's Parents are seeking a placement for the remainder of the 2006-2007 school year at the Montessori School. The Intermediate Unit maintains it has an appropriate placement for him at the Head Start, and that it therefore has at all times satisfied all substantive and procedural legal requirements.

##### **Student's Educational Placement**

###### Parents Request for Tuition to the Montessori 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.<sup>2</sup> 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 Education*, 471 U.S. 379 (1985).<sup>3</sup>

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

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<sup>2</sup> 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.

<sup>3</sup> 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.

*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 concept that "an IEP is a snapshot, not a retrospective," and that the IEP must take into account what was objectively reasonable when 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. 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 Intermediate Unit in this case clearly establishes the program and placement it has recommended for Student is appropriate.

Student currently does not attend the program proffered by the Intermediate Unit. The Parents were trying to sever all ties with the Intermediate Unit and have him educated in a different environment (NT 13).

The first prong of the *Burlington-Carter* analysis is the appropriateness of the program and placement as offered by the Intermediate Unit. As noted above, under the pre-*Schaffer* language of *Burlington-Carter*, 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. While there remains a question as to whether *Schaffer* now puts the burden of persuasion on parents in *Burlington-Carter*, under *Schaffer's* terms that only occurs when the evidence is in "equipoise" or evenly balanced.

There was ample testimony and evidence presented that the program and placement as offered by the Intermediate Unit is appropriate. Student made tremendous growth in the 2006-2006 school year in the IU program (NT 21), progressing in his goals (NT 34). Therefore, the Intermediate Unit issued an evaluation report in July 2006 to change him to a less restrictive environment (NT



38), with the teacher stating Student was ready to move to a less restrictive placement (NT 41). The impression from the teacher was the Parents basically agreed to the evaluation report (NT 42).

The Parents rejected the IEP and NOREP in September 2006 (NT 43). The NOREP offered by the Intermediate Unit was for the Head Start program (NT 44). The impression provided to the witnesses who testified was the Parents wanted Student to attend a typical preschool and did not view the Head Start as a typical preschool (NT 67).

The Head Start classroom was an inclusive classroom, with an occupational therapist and speech therapist on site (NT 55-56). The class was to have a maximum of 20 students (NT 56), of which between four to eight students have disabilities (NT 92). The curriculum used in the facility is aligned with the early learning standards of the state of Pennsylvania (NT 85). The same program has also received positive national recognition (NT 86-88).

Witnesses testified the program offered by the Intermediate Unit would provide him a meaningful education in the least restrictive environment (NT 65, 67, 94, 95). With no evidence or testimony provided to indicate otherwise, the program and placement offered by the Intermediate Unit is appropriate for Student.

Turning to appropriateness of the private placement. Even if the program offered by the Intermediate Unit was inappropriate, there was no evidence or testimony that the program offered by the Montessori School was appropriate. Therefore, there is no opportunity to determine its appropriateness for Student given this lack of information, placement at the Montessori School cannot be ordered.

Finally, in terms of the balancing equities prong of the tuition reimbursement test, there was no evidence indicating the Parents actually paid the tuition. Equitably, a District simply cannot be required to reimburse that which parents have not established that they paid.

Therefore, the claim the Parents make for tuition to the Montessori School cannot be supported.

**V. ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the placement offered by the Intermediate Unit at Head Start is appropriate and the Intermediate Unit is not obligated to pay for tuition to the Montessori School for Student.

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Date

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Hearing Officer