

This is a redacted version of the original hearing officer decision. Select details may 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 B.C.

Date of Birth: xx/xx/xx

File Number: 7805/06-07AS

Dates of Hearings:

August 14, 2007; September 5, 2007; September 13, 2007

OPEN HEARING

Parties:

Mr. and Mrs.

Representatives:

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Date Transcript Received:

September 18, 2007

Date of Decision:

October 2, 2007

Hearing Officer:

David F. Bateman, PhD

I. BACKGROUND

Student is a xx year-old eligible resident of the Wyomissing Area School District (District) with a learning disability, whose Parents requested this Hearing on two specific issues. They seek reimbursement for the 2007-2008 school year at the [redacted Private School and related transportation costs, and reimbursement for the costs of an independent educational evaluation. The Parents requested alternatively, if the District program is found appropriate they be awarded compensatory education for the 2007-2008 school year until all recommendations of Dr. K are implemented. The District alleges their program is appropriate, is the least restrictive environment, and that since it would provide an appropriate program the various reimbursements sought are unwarranted.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age (P-46, p. 1).
2. Student is a resident of the District (P-1, p. 1).
3. Student is eligible for special education and related services as a student with a learning disability (P-47).
4. The Parents completed a questionnaire about Student when he was seven years old (P-13). The Parents noted he dislikes reading and writing, and that he gets frustrated easily.
5. The District completed an evaluation report on September 30, 2005 (P-1). The report found him eligible for special education and related services as a student with a specific learning disability in written expression (P-1, p. 12). This was Student's initial evaluation for special education.
6. On November 2, 2005 Ms. S of Lindamood-Bell provided input to the Parents about potential types of instruction that could be provided for Student (P-2).
7. An IEP meeting was held on November 3, 2005 (P-3). This was Student's first IEP.
8. The District provided a Notice of Recommended Educational Placement (NOREP) on November 14, 2005 (P-4). The NOREP provided 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. Findings of Fact will be designated by "FF" followed by the relevant fact number.

Student's instruction in the regular education classroom since he was reading on grade level.

9. Student's first grade report card indicates satisfactory growth and progress in reading, writing, handwriting, and mathematics (P-1).
10. On April 3, 2006 Mr. W completed an independent educational evaluation (IEE) (P-6). The report found standard scores on the Woodcock-Johnson III Tests of Cognitive Ability of: Verbal comprehension 109, Visual-auditory learning 103, Spatial relations 100, Sound blending 97, Concept formation 84, Visual matching 92, Numbers reversed 76, Incomplete words 114, Auditory working memory 109. The report also found scores on the Tests of Achievement ranging from a standard score of 90 in math fluency to a high of 105 in spelling with one score outside that range of understanding directions a standard score of 51 (P-6, p. 9). The summary of the report supports many of the findings of the District (P-6, p. 13).
11. In May 2006 a review summary of Student's occupational therapy was provided to the Parents (P-7). The report indicates Student has made significant gains and is now functioning within normal as his same age peer group (P-7, p. 2).
12. The Private School completed a Placement Test Summary on May 23, 2006 (P-8). The report indicates the Private School will try the Saxon program in math, and the use of Project Read for reading.

13. An IEP meeting was held on May 31, 2006 (P-9). The purpose of the IEP meeting was to develop a program for the 2006-2007 school year. The program included 30 minutes a day of learning support instruction for a direct structured systematic writing program (P-9, p. 15).
14. On May 31, 2006 the Private School notified the Parents of the acceptance of Student for the 2006-007 school year (P-22).
15. Student's second grade report card indicates he demonstrates appropriate development in reading, listening/speaking, mathematics, science/social studies, and that he needs practice and support in some areas of writing (P-42).
16. On June 21, 2006 the Private School notified the Parents that Student was awarded a scholarship of \$6,500 for the 2006-2007 school year (P-23).
17. The Parents, through their Counsel, notified the District they did not feel Student had been provided FAPE during the 2005-2006 school year (P-24).
18. The Parents filed a due process complaint on July 10, 2006 (P-10). The complaint alleges a denial of a free appropriate public education (FAPE) for 2005-2006 seeking compensatory education and placement at the Private School for the 2006-2007 school year (P-10, p. 3).
19. The Parents requested a review by Dr. K of Student's educational records. The review of July 19, 2006 indicates a recommendation of the Project READ method of teaching reading (P-11).

20. The District offered a NOREP on July 20, 2006 (P-12). The NOREP provides for placement in a learning support resource room.
21. Dr. K completed an independent educational evaluation on Student on August 8, 2006 (P-17). The IEE found a WISC-IV full scale IQ of 87. The summary and recommendation of her report include a diagnosis of double deficit dyslexia (P-17, p. 25). He was diagnosed with this based on her observations of difficulties in phonological and orthographic processing. She agreed with the placement at the Private School (P-17, p. 33). The IEE lists a full scale IQ of 87 (P-17, p. 2); WIAT reading composite score of 81, mathematics composite of 89, written language composite of 82, oral language composite of 119. She recommended the Saxon Math program and the Project Read curriculum that will be used by the Private School (P-17, p. 33).
22. The occupational therapist who worked with Student during second grade provided input to Dr. K indicating he was pleasant to work with and never difficult (P-14). This document was undated.
23. The art teacher who worked with Student for third grade provided a teacher input questionnaire to Dr. K indicating he was always willing to work though he completes his work hurriedly and sometimes lacks attention to detail (P-15). This document was undated.
24. The District authored a summary of Student's educational history on August 23, 2006 (P-16). The summary describes his education for each year in school and typical behaviors and bad and good days.

25. Dr. K provided an addendum to her report of August 2006 indicating she does not feel the program and placement offered by the District would provide him FAPE (P-18).
26. The Parents and the District reached a settlement regarding Student's education for the 2006-2007 school year (S-1). The settlement agreement provided for his education at the Private School for the 2006-2007 school year, a waiver of all claims to date, and half of the costs of the independent educational evaluation of Dr. K.
27. On November 15, 2006 the Private School completed a conference report indicating use of Project Read, Earobics, Co-Writer, Handwriting without Tears, and Saxon Math (P-51).
28. The May 2007 report card from the Private School indicates satisfactory progress in almost all of his subjects (P-51, p. 11).
29. The May 2007 primary grade rating scale from the Private School rates his performance on a likert scale (1 to 5) on 22 skills. His scores indicate a 3 or 4 on most skills (P-51, p. 15).
30. The District completed a reevaluation report on May 14, 2007 (S-2). The reevaluation found he had a disability in written language, weaknesses in reading, with reported anxieties towards school. The report recommended Student receives direct, systematic, and intensive instruction in reading and writing, using research-validated methods. It recommended that Student receive behavioral support, OT consultation, and receive a speech language assessment (S-2, p. 14).

31. The District issued a Notice of Recommended Educational Placement (NOREP) on May 31, 2007 (S-3). The NOREP recommends instruction in the learning support classroom for language arts subjects, and receipt of occupational therapy, speech/language therapy, and guidance supports as related activities.
32. The District issued an IEP on May 31, 2007 (S-3, p. 3). The IEP provides for education and placement consistent with the NOREP.
33. The Private School completed a progress report in May 2007 (P-51). The report indicates progress in Project READ and Saxon Math. The report describes his success in a small class environment (P-51, p. 14).
34. Dr. K completed an independent educational evaluation on July 5, 2007 (P-47). She concluded he had average intelligence and would expect him to achieve at an average rate in school (NT 202). She determined he still has problems with reading, spelling, and written language (P-47). She stated the amount of instruction offered by the District for the 2007-2008 school year was about right (P-47, p. 23). She also found his standard scores on the Woodcock-Johnson-III Achievement Tests changed from January 2006 to July 2007. More specifically, the scores in reading and written language dropped, and stayed about the same in mathematics (P-47, p. 21). She also felt the areas targeted by the District for assistance were appropriate (NT 211-212).
35. The Parents filed an amended due process complaint on July 9, 2007 (P-57). The complaint alleges the program offered by the District is

inappropriate and are seeking placement at the Private School for the 2007-2008 school year.

36. On August 1, 2007 the Parents received billing information from the Private School indicating the tuition for the year is \$16,100 (P-58).

III. ISSUES PRESENTED

Is Student eligible for tuition reimbursement (and transportation) for the 2007-2008 school year to the Private School?

Are the Parents entitled to reimbursement for an independent educational evaluation from Dr. K?

IV. DISCUSSION AND CONCLUSION OF THE LAW

Student's Educational Placement

The legal standard to which the District is held, in educational matters such as this, is clearly established by statute and the courts. The IDEA, as interpreted by the Supreme Court, does not require states to develop IEP's that "maximize the potential of handicapped children," but merely requires the provision of "some" educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). The IDEA requires that the public school program provide access to specialized instruction and related services which are "reasonably calculated" to provide the student with some educational benefit. *Id.* at 207-208. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than

“trivial” or “de minimus” benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”).

Moreover, the Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP allows for significant learning and provides meaningful benefit as necessary to satisfy the IDEA’s FAPE standard. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). Given that progress is relevant to the determination of whether a student with a disability received an educational benefit, it is therefore also relevant to determining whether a reimbursement award is due.

Parents Request for Reimbursement to the Private School 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*

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.

Department of 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.” *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, the 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. 1995); *Fuhrmann v. East Hanover Board of Educ.*, 993 F.2d 1031,

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.

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).

A review of the IEP at issue in this case reveals that it is not reasonably calculated to provide meaningful educational benefit. Specific reasons for the conclusion follow:

The goals and objectives listed on the IEP are observable but not measurable. Some of the goals listed on the IEP are three goals within a goal. The writing goal gives the impression the student will only write once every nine weeks or quarterly. Another example, the behavioral goal on page 19 of 32 of the IEP (S-3) is left up to the student to implement and evaluate. One is left unsure of the role of the guidance counselor in the direct provision of services for Student as a part of the behavior goals. Additionally, the testimony offered little detail on how Student's special education program was provided on a daily basis. The program does not

address his identified needs.

The SDI's incorporated into the IEP are not reasonably calculated to enable Student to make meaningful progress in remediating his problems in reading, written expression, behavior and communication skills. Upon cursory review, the IEP's specially designed instructions may give the illusion of adequacy due to the great quantity, however they are not individualized. One would hope that all students get an opportunity to showcase their abilities in the regular classroom (S-3, p. 24). Implementing the specially designed instruction would require, as listed, one-on-one support for Student for all the immediate praise required. The SDI's for the regular classroom would require similar dramatic changes in the manner in which the teacher provides Student instruction with the behavior probes being implemented every 20 minutes,

Almost none of the SDI's on their face are reasonably calculated to enable Student to make appropriate progress, and the IEP provides no insight into how they are intended to work.

Accordingly, the IEP is also not reasonably calculated to provide meaningful educational benefit.

In this case there was testimony and comments about the requested private school placement that need be addressed. In that connection, the second part of the Burlington-Carter test is the appropriateness of the private school placement. See *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 379 (1985). The program may be appropriate given the analysis below.⁴

⁴ The analysis of the Parent's request for tuition reimbursement is based on the analysis found in the appeals panel decision of December 1, 2006. *In re A.Z.*, Pa. SEA no. 1783.

Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Equitable considerations are relevant to making such a determination. *Id.* However, the parents' choice of private placement need not strictly satisfy the IDEA requirements in order to qualify for reimbursement. *Carter*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Carter; David P. v. Lower Merion School District*, 27 IDELR 915 (E.D.Pa. 1998).

The Private School is for students with learning differences, and the teachers are trained in the Project READ approach for language instruction, the basic reading program at the school (NT 414). The tuition for the school is \$16,100 (P-58). The Parents are also seeking transportation to the school (NT 323).

Why is it an appropriate placement? Dr. K says Student requires the targeted implementation of a synthetic phonetic code emphasis approach to improving his reading, decoding and spelling, et cetera, and that requires the continuation of Project Read in an intensive small group and individualized educational setting, such as offered by the Private School. The Private School is designed to work with students who have learning disabilities (NT 398) in a small class size. The Private School has an eight to one class/student ratio (NT 398). According to the

teacher reports and his report cards, he made progress during the 2006-2007 school year.

It has already determined that the District did not offer FAPE for the 2007-08 school year. After a review of the record, the private placement is an appropriate one. The private school is a small one that addresses Student's needs. His schedule includes intensive programming in small classes in language arts and math, as well as content area classes grouped by the students' abilities and learning differences. In sum, the program at the private school will address Student's identified educational needs and is clearly appropriate under the applicable standard. Additionally, there is nothing in the record to suggest that any adjustment to the award of tuition reimbursement is necessary based on equitable principles. Accordingly, the District shall be ordered to reimburse the parents for the full amount of the tuition to the private school for Student for the 2007-08 school year.

Independent Educational Evaluation⁵

An independent educational evaluation (IEE) is an evaluation "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question."⁶ Parents of a child with a disability have the right to obtain an IEE of their child.⁷ Upon request, each LEA must provide information to parents explaining where an IEE may be obtained.⁸ Whenever parents obtain an IEE, the public agency must consider the evaluation when making

⁵ 34 C.F.R. § 300.502

⁶ 34 C.F.R. § 300.502(a)(3)(i)

⁷ 34 C.F.R. § 300.502(b)(1)

⁸ 34 C.F.R. § 300.502(a)(2)

any decision regarding provision of a FAPE to the child with a disability. In the event that there is a due process hearing, the IEE may be presented as evidence.⁹

The "IEE" issue is governed by 34 CFR § 300.502. It provides that, if a parent disagrees with a school district's evaluation and a hearing officer finds the district's evaluation was not appropriate, an independent educational evaluation shall be at public expense. As the case law has evolved, tribunals sometimes also discuss whether the IEE provided useful information, and one court has said that the parent's disagreement with the district's evaluation need not be fully formed before they obtain the IEE.¹⁰ However, no court has said reimbursement for an IEE can be ordered without (sooner or later) an actual parental disagreement, and no court has said that reimbursement for an IEE can be ordered if the school district's evaluation satisfied the regulatory requirements for special education evaluations.

The Parents have not expressed any disagreement with the District's evaluation. Disagreement is the *sine qua non* of IEEs at public expense. At no time – not even at the hearing – did the family express disagreement with the District's evaluation. Nothing in the regulation provides for parents to be reimbursed for an independent educational evaluation when they silently rush ahead with the independent evaluation rather than waiting for arrangements to be made for the district evaluation that they requested. Thus, an IEE at public expense is not available under § 300.503 in this case.

The legal prerequisites for an IEE at public expense, however, have not been met. The Parents have not disagreed with the District's evaluation. With a request for

⁹ 34 C.F.R. § 300.502(c)

¹⁰ *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 31 IDELR 27 (3rd Cir. 1999).

money but without that disagreement, reimbursement for the IEE is not available under the regulation.

The reimbursement of the independent education evaluation is not warranted.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the Wyomissing Area School District is to reimburse the Parents of Student for the tuition and transportation to the Private School for the 2007-2008 school year. The District is not obligated to reimburse for the expenses of the independent educational evaluation.

Date

Hearing Officer