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## **Decision**

Due Process Hearing for NM  
Date of Birth: xx/xx/xx  
File Number: 7862/07-08AS

Dates of Hearings:  
September 26, 2007; October 10, 2007

## **CLOSED HEARING**

Parties:

Mr. and Mrs.

School District of Philadelphia  
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Date Transcript Received:  
Date of Decision:  
Hearing Officer:

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October 16, 2007  
October 31, 2007  
David F. Bateman, PhD

## **I. BACKGROUND**

Student is a xx year-old eligible resident of the School District of Philadelphia (District) with a learning disability, who also receives speech and language therapy as well as occupational therapy, whose Parents requested this Hearing on two specific issues. They seek a ruling that the August 7, 2007 IEP is inappropriate and seek reimbursement for the 2007-2008 school year at the [Private] School and related transportation costs. 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 FACT<sup>1</sup>

### A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age (P-10).
2. Student is a resident of the School District of Philadelphia (P-10).
3. Student is eligible for special education and related services as a student with a learning disability (P-10, p. 5). He also is eligible for speech and language therapy as well as occupational therapy.
4. The [redacted] Institute completed an evaluation in May 2005 (P-1). The report found a nonverbal IQ on the WPPSI-III of 103 (P-1, p. 22), and a verbal IQ of 77 (P-1, p. 23). The report recommends an intensive multi-sensory, structured, language-based sequential format. He was not found eligible for the category of autism (P-1, p. 23).
5. Student's report card from the 2005-2006 school year from the Private School indicates he has some of his reading skills, but still requires support on many others (D-10). In math, the report card indicates he has established many of the goals. In learning skills, the report card indicates he is developing and still has a challenge in many of the goals. In emotional development, the report card indicates he is developing and still has a challenge in many of the goals.
6. The District issued a permission to evaluate on September 20, 2006 (D-2).

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

7. The District issued another permission to evaluate on October 13, 2006 (D-3). The Parent agreed to the evaluation offering an addendum to the notice (D-3, p. 4).
8. Student's report card for winter 2006 year from the Private School indicates he has some of his reading skills, but still requires support on many others (D-9). In math, the report card indicates he has established many of the goals. In learning skills, the report card indicates he is developing and still has a challenge on many of the goals. In emotional development, the report card indicates he is developing and still has a challenge on many of the goals.
9. Student's report card from January 2007 from the Private School indicates he has some of his reading skills, but still requires support on many others (D-11). In math, the report card indicates he has established many of the goals. In learning skills, the report card indicates he is developing and still has a challenge in many of the goals. In emotional development, the report card indicates he is developing and still has a challenge in many of the goals.
10. On March 28, 2007, the Parents signed the agreement for Student to attend the Private School for the 2007-2008 school year (D-13). Tuition for the year is \$27,700.
11. The District completed a reevaluation report on April 23, 2007 (D-4). The reevaluation report found his continuing eligibility for special education and related services as a student with a learning disability.

The report also notes his need to develop his expressive language skills, and strategies to help deal with his auditory processing deficits. He also needs to improve his social skills (D-4, p. 13). The report further recommends an intensive multi-sensory, structured, language-based instruction that offers him rigorous instruction commensurate with his average ability to learn (D-4, p. 14).

12. An IEP meeting was held on May 1, 2007 (P-10; D-7).
13. The Parents rejected a Notice of Recommended Educational Placement (NOREP) on June 5, 2007 (D-5). The Parent stated she did not believe the program addresses all of Student's areas of need, appropriately incorporates a multisensory structured language instructional program, nor is designed to provide him with meaningful academic benefit. The Parent requested a due process hearing.
14. Student's report card from the 2006-2007 school year from the Private School indicates he has some of his reading skills, but still requires support on many others (D-12). In math, the report card indicates he has established many of the goals. In learning skills, the report card indicates he is developing and still has a challenge in many of the goals. In emotional development, the report card indicates he is developing and still has a challenge in many of the goals.
15. The due process complaint filed by the Parent proposes the IEP incorporate intensive multisensory structured language instruction, modifications to the IEP that address his auditory processing deficit disorder,

modifications that address his inattentiveness and distractibility, a reduced student-teacher ratio, and reimbursement to the Private School if the District is unable to provide for Student (D-6).

16. An IEP meeting was held on August 7, 2007 (D-7). The IEP offered by the District includes goals and objectives for literacy (D-7, pages 10-19), math (D-7, pages 20-23), language (D-7, p. 24), speech and language (D-7, p. 25-26). This is the IEP that is in dispute (NT 4).
17. A NOREP offered by the District indicates a proposal of learning support with the level of service as resource (D-8). The Parents rejected the NOREP because it does not provide FAPE in an appropriate setting.

### **III. ISSUES PRESENTED**

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

### **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 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 Stratford Friends 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

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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.



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 when 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, 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 clearly establishes that it has offered Student an appropriate education based on the information available to it at the time it made these decisions.

Turning to Student's current program for his second grade year, which is presently underway at the time of this proceeding, the Parents claim the IEP offered by the District is vague and not individualized. Specifically, the Parents claim the lack of short-term objectives and ill-defined specially designed instruction makes this IEP defective. However after a careful review of the IEP by the Hearing Officer, the District's IEP (D-7) offers Student the high level of services that he needs in order to make educational progress, and provides Student with academic support. This IEP is designed to address Student's areas of identified need. There are numerous pages of goals and objectives dedicated to providing Student instruction in literacy. The specially designed instruction and related services have also been provided to assist Student in meeting these goals and objectives, including multisensory instructional program moving step by step from simple to more complex material in a sequential, logical manner through visual, auditory, kinesthetic, and tactile strategies and approaches (D-7, p. 13).

The IEP goals and objectives are detailed, personalized to Student, and provide a high level of understanding of what can be expected as a part of his instruction for the 2007-2008 school year. There are multiple pages of literacy objectives -tied to Student's specific needs; and multiple goals and objectives for math-tied to Student's level of functioning. There was also stipulation during the hearing that the Parents agreed with the speech and language goals and objectives and the occupational therapy goals and objectives (NT 107).

In this case, even though not necessary since the District offered program was appropriate, 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 inappropriate given the analysis below.<sup>4</sup>

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

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<sup>4</sup> 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.

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, Private School is a school for children ages approximately five to 13 with various learning differences, mostly language based learning differences and does have a number of students on the autistic spectrum, some diagnosed as Asperger's, and others undiagnosed (NT 22). The tuition for the school is \$27,700 (NT 78). The Parents are also seeking transportation to the school (NT 71).

However, the Private School is deemed inappropriate given that it fails to respond to the IDEA's least restrictive environment requirement.<sup>5</sup> A parallel goal of the IDEA is that disabled children be educated in classrooms with non-handicapped children "to the maximum extent appropriate." 20 U.S.C. § 1401(33). The IDEA's mainstreaming requirement has been construed to "prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in a regular classroom with supplementary aides and support services can be achieved satisfactorily." *Oberti v. Board of Education*, 995 F.2d 1204, 1207 (3d Cir. 1993). The IDEA requires states to "educate handicapped children with non-handicapped children whenever possible." *Rowley v. Board of Education of Hendrick Hudson Central School District*, 458 U.S. 176, 202 (1982). Therefore, a school district is obliged to balance the goal of providing a student with some educational benefit with a goal of providing that benefit in the least restrictive

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<sup>5</sup> The analysis of the Parent's request for private placement is based on the analysis found in the appeals panel decision of July 2, 2004. *In re G.D.*, Pa. SEA no. 1493.

environment. *Hall v. Shawnee Mission Sch. Dist.*, 856 F.Supp. 1521, 1528 (D. Kan. 1994).

Private special education placements are among the most restrictive on the IDEA's spectrum of placements. Given their restrictive nature, removal of a student with disabilities to a private setting has only been held to comply with the LRE mandate in extremely limited situations for students with severe disabilities, who prove themselves unable to function in a more mainstream environment. In *Carlisle*, the Third Circuit recognized, at least with respect to residential placements, that:

Residential placement at MSB is not, of course, the least restrictive educational environment. The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled. *See* 20 U.S.C. § 1412(5)(B) (requiring maximal educational integration of disabled children with children who are not disabled, and restricting separate schooling to situations when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily).

*Id.* at 1024 (citations omitted; emphasis supplied).

Clearly then, a private placement can be consistent with the IDEA's LRE requirement for some students with disabilities. Here, however, we have a student who is doing well in the regular education curriculum and the Parents are seeking to send her to a private placement. While, admittedly, under *Florence*, Parents are not held to the same stringent standards as the District, the LRE concept is so basic to the purposes of IDEA that a parental placement must at least take this predisposition into account.

Factors to consider in determining whether this has been properly taken into account are as follows:

- A. Steps taken by the school to try to include that child in a regular classroom.
- B. The comparison between the educational benefit the child would receive in a regular classroom --social and communication skills, etc.-- and the benefits the child would receive in a segregated classroom. Thus, a determination that a child would make greater academic progress in a segregated program may not warrant excluding that child from a regular classroom.
- C. Possible negative effect inclusion may have on the education of other children in the classroom.

Additionally, if placement outside of a regular classroom is necessary for the child to receive educational benefit, a school district at least may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with non-disabled children whenever possible.

Consequently, given that several of these factors may not have been satisfied by the parental placement, even to a more limited extent than would be required of a district, had this District's offer been inappropriate there is still a severe question whether tuition reimbursement would stand.

Parents allege the after-school program provided to Student at [redacted] provides him the opportunities for interaction with nondisabled students (NT 112-114). While this is appreciated, it does not provide for the structured educational opportunities afforded by the District's second grade classroom.

**V. ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Student was offered a free appropriate public education for the 2007-2008 school year. It is ordered that the District is not obligated to pay for tuition and transportation to the Private School for the 2007-2008 school year.

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Date

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Hearing Officer