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Decision

Due Process Hearing for CH
Date of Birth: April 16, 1992
File Number: 8134/07-08AS

Dates of Hearings:
January 11, 2008; February 6, 2008; March 17, 2008

CLOSED HEARING

Parties:

Souderton Area School District
760 Lower Road
Souderton, PA 18964-2311

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

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March 24, 2008
April 25, 2008
May 10, 2008
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I. BACKGROUND

Student is a xx year-old eligible resident of the Souderton Area School District (District) with a learning disability, whose Parents requested this Hearing seeking 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.

There have been several previous due process hearings for Student. He currently attends the Private School as a result of an Appeals Panel decision¹ that has recently been appealed to Federal Court.

¹ In re: C.H. v. Souderton, PA Spec. Ed. Appeals Panel, 1810, April, 2007.

II. FINDINGS OF FACT²

A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age (P-8, p. 1).
2. Student is a resident of the District (P-6, p. 14).
3. There have been two previous due process hearings involving Student (S-1, S-2, S-3, S-4).
4. The District completed an evaluation report on October 4, 2005 (P-4). This report found his continuing eligibility for special education and related services (P-4, p. 10).
5. On June 18, 2007, the District sent a letter to the Parents regarding IEP development and the need for information from Private School (S-23).
6. The District sent a letter on June 27, 2007 to the Private School requesting information regarding Student's progress (S-5).
7. On June 27, 2007, the District sent a letter to Private School seeking a release of records (S-25).
8. On July 18, 2007, the District sent a letter to the Parents requesting information from Private School for IEP development (S-24).
9. On July 24, 2007, the Parents sent a letter to the District regarding the summer assessments (P-5, p. 28).
10. The District completed a baseline writing prompt on July 31, 2007 (P-3, p. 14). The report found a below basic level.

² 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.

11. Achievement test results on July 31, 2007, indicate percentile ranks ranging from 9th to 43rd percentile (S-8, p. 4; S-21).
12. Student currently attends Private School (NT 30-31).
13. The District sent a letter to the Parents on August 13, 2007, about reviewing the IEP prior to the meeting (S-7).
14. The District held an IEP meeting on August 14, 2007 (P-3, p. 5). This is the IEP in dispute for this due process hearing. The IEP contains information from Private School in the present levels of performance
15. The District sent a letter to the Parents on August 15, 2008, stating it would like to review the information from the Private School to incorporate into the IEP (S-8).
16. A NOREP was issued on August 15, 2007, that was revised with updated information (S-26).
17. The Parents rejected the IEP and NOREP on August 29, 2007. It was received at the District on September 4, 2007. The Parents in their letter stated Student would be attending Private School and are seeking tuition reimbursement from the District (S-9). The reasons the Parents rejected the NOREP were: The IEP does not address organizational and attention issues and does not adequately address language arts and math (S-9, p. 3).
18. On September 6, 2007, the District sent a letter to the Parents requesting permission to evaluate (S-10). The Parents did not provide permission.

19. On September 28, 2007, the Parents sent a letter to the District stating they did not understand the reason for the reevaluation (S-13).
20. The District sent a letter to the Parents on October 15, 2007, indicating the reasons for the reevaluation request (S-27).
21. A resolution meeting was held on October 19, 2007 (S-14). There was no resolution.
22. The Parents sent a letter to the District on November 3, 2007, indicating they are still unclear of the reasons for the reevaluation request (P-5, p. 27).
23. Student's eight grade PSSA scores indicate proficiency in reading and below basic in math (NT 211).

III. ISSUE 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

This Hearing was delayed numerous times due to scheduling difficulties of witnesses, witness illness, and numerous other factors. All parties to this Hearing made a good faith effort to move this along in a timely fashion but outside factors kept getting in the way.

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

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.³ 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

³ 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.

appropriate education. See *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 379 (1985).⁴

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.

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,

⁴ 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 reasonably calculated to provide meaningful educational benefit. Specific reasons for the conclusion follow. It should be pointed out that the IEP was developed without records from the Private School, despite numerous requests (NT 214, 218-219, 253, 254-255, 291).

Student's disability is stated very clearly right away in the first paragraph (P-3). In addition, the discrepancy is explained. The second and third paragraphs go on to explain his more recent educational history. The fourth paragraph contains measurable and observable CBA data with, "Student was able to read passages on a sixth grade level at a rate of 125 words per minute."

In the fifth paragraph the math teacher reported to the IEP drafter that Student did “fairly well” on his exam and at another part reported that he “did a good job.”

Overall on the first page (S-8, page 11 of 34) there was some curriculum-based assessments. The teachers mostly reported based on their own anecdotal observations and opinions.

On the third page (S-8, page 13 of 34); the assessment results from the Woodcock-Johnson III were included, which is very measurable and observable. Additionally, on the fourth page is the explanation of the PSSA Writing Prompt that is based on the PSSA writing rubric.

One question about the IEP is what is “Fund of knowledge”? How is it measured?

It is clear as a part of the statewide assessment how Student will participate. The accommodations are spelled out on this page for the different PSSA tests.

The objectives for the IEP, on the whole, are clearly stated, providing a direction and guidance for individuals who would be implementing the IEP. There are some basic minor details that need to be addressed, but it is clear the team that developed the IEP spent a lot of time working to craft one for a student where there has been multiple due process hearings.

The first goal, the reading fluency goal, should have an expected level of achievement of one year’s growth. The goal states to an 8th grade equivalent

however the WJ-III baseline is a 6.7 grade equivalent. This goal also needs to be more measurable and observable.

The decoding/word identification skills goal is not very observable and measurable. What is meant by three consecutive weekly probes? Does that mean three times per week, or does that mean one every week for three weeks in a row?

The next goal, the reading comprehension skills and understanding of word meaning and language structure was listed as a strength, but is not a strength according to the WJ-III. Student's WJ-III grade equivalent for passage comprehension was a 5.2. His English teacher indicated in Present Educational Levels that he comprehends text well especially when taking the opportunity to listen to someone read aloud or to recorded texts. This is an accommodation. Reading comprehension is a need of Student's therefore it is appropriate to have as an Annual Goal, but should be removed as a strength.

The spelling goal could also be more measurable and observable.

For the math fluency goal, the WJ-III indicates a need in math with a grade equivalent of 5.3 but according to the first paragraph of the Present Ed. Levels Student was diagnosed with a language based Learning Disability, specifically in the areas of reading and written expression. Therefore, it doesn't seem like he has a math Learning Disability. If this is the case, it then causes into question the need for a math Annual Goal

For the math multi-step word problems goal, it's an appropriate goal to keep because it deals with multi-step word problems and he has a language

based Learning Disability. Interestingly enough, Student did better in this area on the WJ-III test (7.7), which deals with his area of disability. Overall, he did well with math according to the WJ-III but is still functioning below grade level.

Other than being unsure of the purpose of the first specially designed instruction, the SDI seems appropriate for Student (see also NT 170-171, 178-179). The related services component also provides appropriate detail.

Above is listed some details that might need to be changed, but the IEP, taken as a whole, is reasonably calculated to provide meaningful educational benefit.

“Perfection is not required” in an IEP.⁵ “[T]he law is clear that technical perfection is not the objective of the statute.”⁶ Accordingly, “not every procedural error will render an IEP ‘legally inadequate.’”⁷ The question in the face of a procedural failing is whether the failing interfered with access to FAPE or resulted in an educational loss.⁸ “Vagueness and measurability problems” with goals are mere technical non-compliance.⁹ “The types of IEP procedural defects that have

⁵ *Loren F. v. Atlanta Ind. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

⁶ *Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248, 1273 (S. D. Ala. 2005).

⁷ *Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 378 (S.D. N.Y.) (citing *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir. 2003)). *See also School Bd. of Collier County v. K.C.*, 285 F.3d 977, 982 (11th Cir. 2002) (“A procedurally defective IEP does not automatically entitle a party to relief.”). *See also* 20 U.S.C. § 1415(f)(3)(E); 34 CFR § 300.513.

⁸ *See, among many others, Wagner v. Board of Educ. of Montgomery County*, 340 F. Supp. 2d 603, 616 (D. Md. 2004) (citing cases); *Adam J.*, 328 F.3d at 811-12 (citing cases).

⁹ *Escambia County Bd. of Educ.*, 406 F. Supp. 2d at 1273. *See also Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 611-12 (6th Cir. 2006) (applying “procedural harm” analysis to claims of insufficient present levels and measurable goals); *Adam J.*,

been held to violate a child's right to a FAPE are those that 'result in the loss of educational opportunity,' 'seriously infringe upon the Parents' opportunity to participate in the IEP formulation process,' or 'cause[] a deprivation of educational benefits.'"¹⁰

In this case there was testimony and comments about the requested private school placement that need be addressed even though the IEP and program offered by the District has been ruled to be appropriate. 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.¹¹

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

328 F.3d at 811 (stating procedural issues relate to development of IEPs, including, e.g., measurable goals and objectives, and present levels of education).

¹⁰ *Escambia County Bd. of Educ.*, 406 F. Supp. 2d at 1273 (citing *A.I. v. District of Columbia*, 402 F. Supp. 2d 152 (D. D.C. 2005)). See also *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 520 (6th Cir. 2003); *A.K. v. Alexandria City Sch. Bd.*, 409 F. Supp. 2d 689, 692 (E.D. Va. 2005) (citing multiple case precedent), *rev'd on other grounds*, 484 F.3d 672 (4th Cir. 2007).

¹¹ The analysis of the Parent's request for tuition reimbursement is based on the analysis found in the appeals panel decision of April 20, 2004. *In re C.B.*, Pa. SEA no. 1472.

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 Orton-Gillingham reading method (NT 326). The Parents have not received any special funds or tuition break from Private School (NT 373). The Parents are also seeking transportation to the school (NT 16).

Why might it be an appropriate placement? The Private School is designed to work with students who have learning disabilities (NT 325-326) in a small class size (NT 326)

It has already determined that the District did offer FAPE for the 2007-08 school year. After a review of the record, the private placement would be an appropriate one if the District's placement were not. The private school is a small one that could address Student's needs. His schedule includes intensive programming in small classes at the Private School. In sum, the program at the private school could address Student's identified educational needs and is clearly appropriate under the applicable standard.

Equities do not favor reimbursement

The District stated correctly as a part of their closing arguments that the balance of the equities do not favor reimbursement.

The IDEA 2004 specifies that reimbursement may be reduced or denied if

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP

Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days . . . prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);

20 U.S.C. §1412(a)(10)(C)(iii). The District does not need to show prejudice by lack of timely notice.¹² Rather, as in *Bernardsville*, 42 F.3d at 156-58, the parents bear the burden of showing circumstances justifying relief from the notice requirement. The statute, however, provides very specific and limited circumstances in which notice is excused. 20 U.S.C. § 1412(a)(10)(iv) (providing exceptions from notice if the LEA prevented parents from providing notice, parents did not receive procedural safeguards, or providing notice would risk harm to the student, and in some circumstances, if parents are illiterate).

The Parents did not give a timely notice of their request for tuition reimbursement.

¹² *Pollowitz v. Weast*, 90 Fed. Appx. 438, 2001 WL 390035, 34 IDELR 171 (4th Cir. 2001) (*per curium*).

V. ORDER

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

Date

Hearing Officer