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PENNSYLVANIA

SPECIAL EDUCATION DUE PROCESS HEARING OFFICER

Re: ODR No. 8467/07-08 LS
SB
North Penn School District

For the Student:

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Dates of Hearing: April 7, April 8, April 9, 2008
Date Record Closed: April 15, 2008
Date of Decision: April 29, 2008
Hearing Office: Daniel J. Myers

BACKGROUND

The parents of Student, who has been identified as having speech and language needs as well as suspected Aspergers Syndrome, attention deficit hyperactivity disorder (ADHD) and learning disabilities, request tuition and transportation reimbursement for Student's unilateral placement at the private [redacted] School (Private School). For the reasons described below, I find for the School District.

ISSUE

Whether Student's parents are entitled to reimbursement for 2007-2008 tuition and transportation for Student's unilateral placement at the Private School.

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a resident of the School District. Prior to first grade he was identified as having disabilities in language, fine motor skills, socialization and behavioral functioning, and the School District offered to provide educational programming and placement in a regular first grade classroom, with full-time support from an autistic support teacher and/or her assistant, along with a full time 1:1 aide. (SD3; SD5; P14; N.T. 225)¹ Student's parents rejected the School District's proposed program and placement, preferring instead to enroll Student in a private elementary school continuously from 1st through 8th grades. (P1; SD4; SD6; SD17; N.T. 226)
2. In the spring of 2008, Student's parents began looking for the school Student would attend in 9th grade, securing a private psychoeducational evaluation in mid-

¹ References to "P", "SD", and "HO", are to the exhibits of the Parent, School District, and Hearing Officer, respectively. References to "N.T." are to the transcripts of the hearing sessions in this matter.

- February 2007. (N.T. 228, 260; SD7) Student's privately-secured school psychologist is a certified school psychologist, a certified psychologist, she has 30 years experience in her field, and she has a Ph.D. in clinical assessment, clinical psychology and educational assessment. (N.T. 75-76) Based upon two days of testing, interviews with parents and behavior rating forms from Student's private school teachers, Student's privately-secured school psychologist concluded that Student is an individual with average range intellectual capabilities, a relative weakness in visual processing, uneven attention to tasks, weak graphomotor skills, weaknesses in word identification and reading comprehension, and a significant weakness in expressive writing skills. (SD7, p.16; N.T. 81) She did not see strong evidence of Aspergers Syndrome in either parent or teacher responses to the Behavioral Assessment Scales for Children (BASC). (N.T. 97) Student's privately-secured school psychologist recommended academic support in the inferential reading process and tutoring to enhance reading fluency. She also recommended counseling support to deal with motivation and self-worth, including a social skills training group and some individualized counseling support around anxiety and discouragement. (SD7, pp.16-17)
3. Student graduated from his private elementary school in June 2007 with an A- in Math and Bs in Language Arts, Writing, Social Studies and Literature. (P12) His private elementary school's graduation report describes Student as serious, shy, and reluctant to join into play or conversations with children. He becomes stressed, agitated and upset by peer social situations that feel overwhelming. He enjoys the academic challenges of math, science and technology, participated

successfully in drama, and he is willing to persist in areas of difficulty such as writing. The school's acting headmaster believes that Student needs consistent individualized attention and is concerned about Student attending a large school where social interaction is largely unstructured and unsupervised, and where Student would be responsible for determining when he needs adult intervention. (P13)

4. In June 2007, Student's parents retained an attorney, after which they gave notice to the School District that they intended to enroll Student in Private School, shared with the School District the evaluation report of their privately-secured school psychologist, and gave permission to the School District to conduct its own evaluation of Student. (P14; P16; SD8; SD9; N.T. 27-28, 228-230, 264) At all times, Student's Parents have been responsive to School District's requests and sincere in considering the School District's proposed educational program and placement. (N.T. 66)
5. On August 21, 2007, the School District had prepared a draft evaluation report (ER). (P17) The School District psychologist conducting the psychoeducational portion of the ER has a masters degree in school psychology, is a certified school psychologist, a licensed psychologist, a certified special education teacher, special education supervisor and pupil personnel director, and has 30 years combined experience as a teacher, school psychologist, and director of special education. (N.T. 323-324) The School District did not share this ER with Student's parents at that time, however, because a speech and language evaluation was still pending. (N.T. 31)

6. Meanwhile, Student began attending Private School for the 2007-2008 school year. (P18, P20, P21; SD16) Private School provides small school, college preparatory education to 80 children, grades 6-12, all of whom have learning disabilities and 25% of whom are diagnosed with Aspergers Syndrome. (P23; N.T. 181, 203-204) Typical class sizes are 6-8 students per class. (N.T. 185) The environment is very nurturing, with daily adult mentoring periods for each child, making sure students are on track and getting necessary supports if they are struggling. (N.T. 182-184) Twice weekly group counseling is required for all students to help with social and emotional problems. (N.T. 182, 187) Student has not required accommodations in his Private School classes, although he does require redirection and school personnel check Student's homework assignment book daily. (N.T. 184-185, 191, 198, 243; P18) Peer interactions are a weakness for Student, Student has difficulty with breaks in routine, and he struggles with social interactions in less structured environments at Private School. (N.T. 200-201, 244, 276) Student does not receive either speech/language therapy or OT at Private School. (N.T. 197) Annual tuition is \$32,600, and commuter train transportation costs are \$181 per month. (N.T. 203, 251)
7. On October 5, 2007, the School District issued its ER to Student's parents. (SD10; N.T. 131, 140) The ER concluded that Student did not have a specific learning disability and that any previous diagnosis of autism (PDD-NOS) appeared to be no longer educationally relevant. It further noted Student's ADHD diagnosis and related medication, but concluded that ADHD did not appear to cause a substantial impairment in Student's learning. (P17, p.5; SD10, p.9) The ER did,

- however, recommend speech and language support services to develop Student's pragmatic or social language skills as well as his skills in responding to inferential questions. The ER also recommended written or visual cues when given or directions that were either lengthy or required sequential completion. (SD10, p.9)
8. On December 3, 2007, the parties met to discuss the School District's proposed IEP. Another IEP meeting was conducted a week later, on December 10, 2007, following issuance of an occupational therapy (OT) report. (P22; P24; SD12; SD13; SD14; N.T. 47, 207) The School District recommends co-taught classes (taught by regular education and special education teachers together), as well as small group speech and language support services once per cycle for 30 minutes per session to develop pragmatic or social language skills as well as skills in responding to inferential questions, and short term (4 months) direct OT for 30 minutes per week and consultation for up to 30 minutes per month. (P19, p.14; P22, p.4; SD11; SD12; N.T. 151, 165, 219, 301) The small group speech therapy will teach Student to interact with others, monitor a conversation involving multiple people, and replicate real life situations. (N.T. 151) The School District also recommends written or visual cues in class when given directions that are lengthy or require sequential completion. (P19, p.7; SD11; SD12)
9. On January 22, 2008, Student's parents requested a due process hearing. (SD15, 280) They believe the School District's IEP should contain additional, daily supports in organization and study skills, as well as daily, integrated social and emotional support for making friends and interacting with others. (N.T. 302-303) They further believe that the public middle school, with its 900 students and

multiple floors, ramps and corridors, as well as the average class sizes of 25 students, are too large and overwhelming for Student. (N.T. 239-241, 297) They believe that the co-taught classes are not sufficiently challenging for Student. (N.T. 234, 239-240, 283-286, 291) They are also concerned that provision of any counseling services in a different room than Student's regularly assigned classrooms will be stigmatizing and will discourage Student from accessing those counseling services. (N.T. 241)

10. The School District's psychologist and Student's privately-secured school psychologist disagree regarding Student's needs.
 - a. The School District's psychologist does not believe that Student has a learning disability because all achievement test scores are in the average range, which is consistent with Student's average cognitive abilities. (N.T. 341-343, 349, 354; P3; P9) She believes that the School District's proposed IEP's pragmatic language therapy will address Student's inferential analysis needs, and that its organizational provisions appropriately address Student's ADHD needs. (N.T. 350-351) She believes the proposed social skills group will address Student's anxiety and feelings of discouragement. (N.T. 351)
 - b. Student's privately-secured school psychologist acknowledges that Student's reading achievement scores are in the average range, but she notes that they are in the lower end of average, and she further notes that Student's performance scores have decreased between 4th and 9th grades. (N.T. 114-117) She also doesn't think the School District's proposed

program and placement offers any necessary social and emotional support.

(N.T. 89)

- c. In this record, I find the opinion of the School District psychologist to be more credible because Student's privately secured school psychologist appears to exaggerate and minimize Student's needs to better fit the Private School program. The privately secured school psychologist's diagnosis of academic needs ignores Student's consistently average range achievement scores and overemphasizes the fact that some achievement scores are in the lower end of the average range. (SD7; N.T. 114, 354) She also did not recommend either a speech/language or OT evaluation for Student because, although Student had needs in those areas, the psychologist felt that the Private School curriculum would address those needs. (N.T. 124)

11. An unsuccessful mandatory resolution meeting was conducted on February 21, 2007. Hearing sessions were conducted on April 7, April 8, and April 9, 2008. Parent Exhibits P1-P24 were admitted into the record. (N.T. 401) School District Exhibits SD1-SD18 were admitted into the record. (N.T. 402) Hearing Officer Exhibits HO1 and HO2 are admitted into the record.

DISCUSSION

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide FAPE to all students who qualify for special education services. 20 U.S.C. § 1412 The United States Supreme Court has held that, in an administrative hearing such as this, the burden of persuasion (which is only one

element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 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) In this case, Student's parents seek relief (tuition reimbursement) and therefore they bear the burden of persuasion. Of course, where any party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the evidence is not in equipoise, and the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence, and Schaffer does not come into play.

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 FAPE. Second, if the School District has not offered FAPE, Student's parents 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. 20 USC §1412(a)(10)(C); 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)

**Lack of Previous Receipt of Special Education Services from
the School District Precludes Reimbursement**

The School District argues that we can not even consider the Burlington-Carter test in this case because this particular Student never previously received special education and related services under the authority of a public agency, as required by the IDEIA. The statutory provision at issue states:

(ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT.—If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. §1412(a)(10) (C)(ii) (emphasis added)

The Federal Courts of Appeals differ regarding their interpretations and applications of the relevant clause of 20 U.S.C. §1412(a)(10) (C)(ii). The First Circuit Court of Appeals determined that tuition reimbursement was not permissible where a disabled child, who had not yet been identified as disabled, was unilaterally removed from her regular education public school 4th grade class and enrolled in private school. Greenland School District v. Amy N., 358 F.3d 150, 40 IDELR 203, 104 LRP 7945 (1st Cir. 2004) The Court determined that the purpose of the notice requirement was to give public school districts the opportunity to provide FAPE before a child leaves public school and enrolls in private school. See Baltimore City Bd. of Sch. Comm'rs v. Taylorch, 395 F. Supp. 2d 246 (D. Md. 2005) (where student has not previously received publicly directed special education, her parents are not eligible for tuition reimbursement under the IDEA); Carmel Cent. Sch. Dist. v. V.P. ex rel. G.P., 373 F. Supp. 2d 402, 415 (S.D.N.Y. 2005) (holding tuition reimbursement not available as a matter of law, without regard to Burlington factors, where parents never placed their child in the public school, never contemplated doing so, and did not give public school a chance to see if it could implement an IEP allowing the student to be educated in the public schools.)

On the other hand, the Second Circuit Court of Appeals has determined that the relevant clause of 20 U.S.C. §1412(a)(10) (C)(ii) is ambiguous and, when principles of statutory construction are applied, cannot be used to establish a threshold requirement that a disabled child must have previously received public special education and related services in order to be eligible for tuition reimbursement. Frank G v. Board of Education of Hyde Park, 459 F.3d 356, 46 IDELR 33, 106 LRP 44800(2nd Cir. 2006), cert. den. ___ U.S. ___, 127 S. Ct. 3054 (2006); See also, Board of Education of New York City v. Tom E, 193 Fed. Appx. 26, 106 LRP 48499 (2nd Cir. 2006) These Second Circuit opinions, however, while finding the statutory language ambiguous, do not discuss what the Court thinks Congress did intend with its ambiguous language. Rather than analyzing and attempting to discern the Congressional intention behind the ambiguous statutory language, the Second Circuit simply treats the language as if it never existed in the first place. Yet, even ambiguous language must have been intended to mean something, and it is disappointing to see no discussion in the Court's opinions regarding the possible intentions of such ambiguous language.

It seems that I am required to choose between two differing courts' theories regarding the applicability/ambiguity of the relevant clause of 20 U.S.C. §1412(a)(10) (C)(ii). (Because the Third Circuit Court of Appeals has not yet weighed in on this issue, I lack binding precedent.) I choose in this case to follow the First Circuit case law, and in the next paragraph I apply, with all due respect to much greater legal minds than mine, an analysis similar to the sort of analysis that I would apply to a credibility determination among conflicting psychologists' opinions.

The First Circuit's Greenland decision is simple – it looks at obvious statutory language and applies it. The Second Circuit opinions are more complex – they look at the same obvious language and credibly conclude that it is ambiguous. Not as credible, however, is the Second Circuit's next step after finding the language to be ambiguous; the Court simply (and without explanation) ignores the ambiguous language as if it never existed in the first place. If the Second Circuit opinions offered any reasoning as to what the ambiguous language might have been intended to accomplish, then I might be more inclined to follow its two-step reasoning regarding the language's ambiguity (first step) and solution (second step). Without such two step analysis, however, I am inclined to follow the First Circuit's simpler one-step analysis.

In this case, Student has never attended the School District's public schools. (P1; SD4; SD6; SD17; N.T. 226) Student's parents rejected the School District's proposed 1st grade program and placement, preferring instead to enroll Student in a private elementary school continuously from 1st through 8th grades. (P1; SD4; SD6; SD17; N.T. 226) Thus, Student's parents do not qualify for tuition reimbursement under 20 U.S.C. §1412(a)(10)(C)(ii) because Student did not previously receive special education and related services under the authority of the School District.

The Burlington-Carter Test

In the event that an appellate review disagrees with my legal conclusion regarding 20 U.S.C. §1412(a)(10)(C)(ii), I will also include alternative factual findings and legal conclusions regarding the traditional Burlington-Carter reimbursement analysis. As noted above, the first question is whether or not the School District offered Student a

FAPE. In this case, I conclude that the School District ultimately offered FAPE, but not until December 11, 2007.

The School District did not offer FAPE for the First Half of 2007-2008

In June 2007, Student's parents gave notice to the School District that they wanted Student to attend Private School at public expense, they shared with the School District their privately-secured evaluation report, and they gave permission to the School District to conduct its own evaluation of Student. (P14; P16; SD8; SD9; N.T. 27-28, 228-230, 264) Although the School District had prepared a draft ER by August 21, 2007 (P17), it did not share this ER with Student's parents at that time (N.T. 31), waiting until October 5, 2007, to issue its ER. (SD10; N.T. 131, 140) Further, it was not until December 3, 2007, that the parties met to discuss the School District's proposed IEP, and it was another week (December 10, 2007) before the School District had actually proposed its final IEP. (P22; P24; SD12; SD13; SD14; N.T. 47, 207)

Under these circumstances, the School District's proposed offer of FAPE did not exist until December 10, 2007. Thus, for purposes of the Burlington-Carter test, I must conclude that the School District did not offer Student FAPE for the 2007-2008 school year prior to December 10, 2007.

Private School Satisfies Burlington-Carter's Second Prong

If a school district has not offered FAPE, the second prong of the three-prong Burlington-Carter test requires Student's parents to establish that the private school is appropriate for Student. 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

particular Private School at issue in this case has been determined to appropriately meet the needs of a child with disabilities, albeit not the same child as in this case. Lauren W. v DeFlaminis, 480 F.3d 259 (3rd Cir. 2007)

The record in this case establishes that Private School provides small school, college preparatory education to 80 children, grades 6-12, all of whom have learning disabilities and 25% of whom are diagnosed with Aspergers Syndrome. (P23; N.T. 181, 203-204) Typical class sizes are 6-8 students per class. (N.T. 185) The environment is very nurturing, with daily adult mentoring periods for each child, making sure students are on track and getting necessary supports if they are struggling. (N.T. 182-184) Twice weekly group counseling is required for all students to help with social and emotional problems. (N.T. 182, 187) I conclude that this is sufficient to meet the requirements of the second prong of the tuition reimbursement test.

The Equities Favor Student's Parents

The third tuition reimbursement prong is a weighing of the equities, if FAPE has not been offered and if the private school is appropriate. 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)

At all times, Student's Parents have been responsive to School District's requests and sincere in considering the School District's proposed educational program and placement. (N.T. 66) Further, although the School District had prepared a draft ER by August 21, 2007 (P17), it did not actually have a finished ER until October 5, 2007 (SD10; N.T. 131, 140), and it did not offer an IEP until December 3, 2007, which was

revised a week later, on December 10, 2007, following issuance of an OT report. (P22; P24; SD12; SD13; SD14; N.T. 47, 207) I conclude that this is sufficient to meet the requirements of the third prong of the tuition reimbursement test.

FAPE was offered for the Second Half of the 2007-2008 School Year

After December 10, 2007, the School District did offer FAPE to Student. The School District's IEP offers co-taught classes (taught by regular education and special education teachers together), small group speech and language support services, short term (4 months) direct and consultative OT, and written or visual cues in class when Student is given directions that are lengthy or require sequential completion. The small group speech therapy will teach Student pragmatic or social language skills as well as skills in responding to inferential questions, it will help him interact with others, monitor a conversation involving multiple people, and replicate real life situations. (P19, pp.7, 14; P22, p.4; SD11; SD12; N.T. 151, 165, 219, 301) The School District's proposed IEP is consistent with the recommendations of both Student's privately-secured school psychologist and the School District's ER for academic support in reading, as well as counseling and social skills training. (SD7, pp.16-17; SD10, p.9; N.T. 81, 341-343, 349-354)

Student's parents believe the School District's IEP also should contain additional, daily supports in organization and study skills, and daily integrated social and emotional support for making friends and interacting with others. (N.T. 302-303) They further believe that the public middle school is too large for Student, that the co-taught classes are not academically appropriate for Student, and that the proposed counseling services

will be stigmatizing and will discourage Student from accessing those counseling services. (N.T. 234, 239-241, 283-286, 291, 297)

I disagree with Student's parents. Although Private School provides small school, college preparatory education in a very nurturing environment, with daily adult mentoring periods for each child and school personnel checking Student's homework assignment book daily, the psychoeducational evaluations do not establish that Student's needs require this. (P18, P20, P21; P23; SD16; N.T. 181, 185, 203-204) Further, while Private School provides twice weekly group counseling, the School District offers both speech/language therapy and OT to address Student's needs, neither of which he receives at Private School. (N.T. 182, 187, 197)

I conclude that the School District's proposed educational program and placement, once it was finally offered on December 10, 2007, offers FAPE to Student. Thus, for the second half of the 2007-2008 school year, Student's parents failed to meet their burden of proof (i.e., the Burlington-Carter test) because the School District offered FAPE.

Student's Parents are Not Entitled to Transportation Reimbursement

Student's parents also seek reimbursement for their costs of transporting Student to and from Private School via commuter train. They offer no legal basis, however, for this request. There is no argument that Student's educational needs require special transportation, and Student's parents cite to no law indicating that tuition reimbursement also includes reimbursement of transportation costs. Thus, even if Student's parents were entitled to any tuition reimbursement, they are not entitled to reimbursement of transportation costs.

CONCLUSION

Student has attended private schools at private expense throughout his academic career. He now seeks reimbursement of private school expenses for his current 9th grade school year. I conclude that the IDEIA only permits tuition reimbursement for parents whose children previously received special education and related services under the authority of a public agency. Because Student does not fit this criterion, his parents are not entitled to tuition reimbursement. In alternative findings under the Burlington-Carter analysis, however, I do find that Student's parents would be entitled under the record developed in this case to tuition reimbursement of the first half of the 2007-2008 school year because the School District did not offer FAPE until December 10, 2007. I also find that, even for that time period, Student's parents would not be entitled to transportation reimbursement.

ORDER

- Student's parents are not entitled to reimbursement of tuition or transportation costs for the 2007-2008 school year.
- No action is required of the School District.

Daniel J. Myers

Daniel J. Myers
Hearing Officer

April 29, 2008

ODR No. 8467/07-08 LS
Student
North Penn School District