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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: NB

Date of Birth: XX/XX/XX

Dates of Hearing: December 2, 2008 & January 29, 2009

CLOSED HEARING

ODR Case # 9331-08-09-LS

Parties to the Hearing:

Mr.
Ms.

Mr. Paul Schleyer
Lancaster School District
251 S. Prince Street/3rd Floor
Lancaster, PA 17603

Representative:

Pro Se

Mr. Jeffrey Champagne
McNees, Wallace, & Nurick
100 Pine Street/P.O. Box 1166
Harrisburg, PA 17108-1166

Date Record Closed:

February 16, 2009

Date of Decision:

March 3, 2009

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”) is an early teen aged student residing in the Lancaster School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)¹. The student’s parents and the District disagree over the individualized education plan (“IEP”) and the educational placement for the student. As a result, the parents have placed the student in a private placement for the 2008-2009 school year and seek tuition reimbursement from the District.

For the reasons set forth below, I find in favor of the District.

ISSUES

Must the District reimburse parents for out-of-pocket private school tuition for the 2008-2009 school year?

FINDINGS OF FACT

¹ It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

1. The student was identified in 2nd grade (the 2002-2003 school year) as a student in need of special education and related services as a student with a specific learning disability in reading. In December 2005, the student was identified as a student with an emotional disturbance. (School District Exhibit ["S"]-9).
2. In December 2006, the student's individualized education plan ("IEP") team met for the annual review of the student's IEP to design the student's education program for one chronological year, from December 2006 to December 2007—the latter half of 5th grade and beginning of 6th grade. (S-1).
3. The District recommended, and the parents agreed to, a placement in the student's neighborhood elementary school for the remainder of the 2006-2007 school year with itinerant learning support services. (S-2).
4. In the summer of 2007, the student was transitioning from 5th grade in elementary school to 6th grade in middle school. After discussions with the parents, the District anticipated that the student would attend the [redacted] Academy, a regular education school that provided services to District students who struggled finding a comfort level in the District's middle schools and high schools. The student did not attend the Academy. From the first day of school in 6th grade (the 2007-2008 school year), the student attended the neighborhood middle school. (Notes of Testimony

- December 2, 2008 session [“NT-December 2nd”] at 64, Notes of Testimony January 29, 2009 session [“NT-January 29th”] at 10, 30-31, 50-52, 203-206, 252-253)².
5. For the most part, the student did not encounter any difficulties in the first quarter of 6th grade (the 2007-2008 school year). (NT-December 2nd at 84; NT-January 29th at 9-10, 58, 209-210.)
 6. Towards the end of the first quarter and into the second quarter of 6th grade, the student’s academic performance and behavior began to deteriorate. The District performed a functional behavior assessment. It also responded to parents’ request/the student’s preference for less intensive instruction in reading and increased instruction in social studies and science as well to a request to change the student’s math teacher. (S-3; NT-December 2nd at 64-68, 86-87, 91; NT-January 29th at 10-11, 211-214).
 7. In December 2007, the IEP team met for the annual review of the student’s IEP. This IEP team meeting coincided with a heightened concern by the parents for the student’s academic, behavioral, and emotional well-being. (NT-January 29th at 91-92, 214-216).
 8. On December 12, 2007, the District recommended, and the parents agreed to, a placement in the student’s neighborhood

² The hearing took place over two sessions—December 2, 2008 and January 29, 2009. The notes of testimony for the December 2nd session are numbered pages 1-147. The notes of testimony for the January 29th session do not begin at page 148; those pages start over and are numbered pages 1-282. Therefore, the notes of testimony in the findings of fact are explicitly distinguished between the two dates.

school with itinerant support. This is the last agreed-upon program and placement for the student. (S-4, S-5).

9. In January and February 2008, the student was absent from school due to several factors involving issues in Student's personal/family life. (Parents' Exhibit ["P"]-2; S-8 at page 4; NT-December 2nd at 92-93; NT-January 29th at 225).
10. The District attempted to work with the student in terms of counseling, anger management, and other strategies to compensate for emotional and other attention difficulties the student experienced in the second half of the 2007-2008 school year. (P-1; S-13; NT-December 2nd at 69-78, 94-96, 109; NT-January 29th at 21-26, 41-43, 49-50, 52-57, 62-65, 71-79, 86-88).
11. In March 2008, the parties both agreed that a re-evaluation of the student was warranted, resulting in the most recent re-evaluation report of May 2008. (S-8; NT-December 2nd at 94, 96-97, 116; NT-January 29th at 148-152).
12. Based on the re-evaluation report, the student's IEP team met to discuss the student's IEP. The District recommended placement of itinerant learning support in a regular education setting. (S-9, S-10).
13. While no particular setting for the implementation of the IEP was discussed, the District felt that the student's IEP could be delivered at either the student's neighborhood middle school or at

- the Academy. District witnesses opined that they felt the Academy would be an appropriate location for the delivery of the student's IEP. (NT-December 2nd at 143-144, 153-156).
14. The notice of recommended educational placement ("NOREP") provided to the parents in May 2008 was rejected by parents. The date of May 29, 2008 was written in by parent's signature on the NOREP but apparently it was not returned to the District until September 2009. (S-10; NT at 165-166).
 15. Parents' frustrations with the District had been growing throughout the 2007-2008 school year. It is unclear when, exactly, the parents began considering a private placement. There are some indications that parents were investigating a private placement at the beginning of the school year. In May 2008, the student's mother attended an open house at a private school for students with learning disabilities and behavior problems. Thereafter, she filled out an application for the private school. (NT-January 29th at 208, 218-221, 224-226).
 16. The student attended the neighborhood middle school at the beginning of 7th grade, the 2008-2009 school year. (NT-January 29th at 226-227).
 17. In mid-September 2008, the parents returned the NOREP for the 2008-2009 school year. At the meeting where the NOREP was returned, the parents informed the District that the student was

being removed from the District and would be attending the private placement.

18. At that time, however, the parents did not inform the District that they expected the District to pay for the private placement. (NT-January 29th at 165-167).

19. Limited evidence was produced about the private placement. But apparently the student is in a small class (six students to a class), receives one-on-one daily tutoring, and performs some degree of academics in a computer-based classroom. (NT-January 29th at 230-231).

20. The parents feel the student has made progress at the private placement. (NT-January 29th at 244-245).

21. The parents were awarded a degree of financial aid to attend the private school. Their out-of-pocket expenses amount to \$3,500. (S-14).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law.³ Long-standing case law and the IDEIA provide for the potential for private school tuition

³ 34 C.F.R. §§300.1-300.818; 22 PA CODE §§14.101-14.

reimbursement if a school district has failed in its obligation to provide a free, appropriate public education (“FAPE”) to a child with a disability.⁴

There are two aspects to analyzing a parent’s claim for tuition reimbursement: notice requirements to the school district and a substantive analysis of the student’s program. The notice requirements relevant to this case require that:

“(a)t the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents...inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(a)t least ten (10) business days...prior to the removal of the child from the public school, the parents...give written notice to the public agency of the information described in (the preceding paragraph).”⁵

In this case, the parents did not inform the IEP team at its last meeting in May 2008 that they were rejecting the placement proposed by the District with the intent to enroll the student in a private placement at public expense. (FF 11, 14, 17). Additionally, the parents did not inform the District in writing of similar intentions prior to removing the student from the District. (FF 17, 18).

⁴ 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi); Florence County Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep’t. of Educ., 471 U.S. 359 (1985).

⁵ 34 C.F.R. §300.148(d)(1).

The District cites to a Pennsylvania Special Education Appeals Panel opinion (“Appeals Panel Opinion”) which posits that not following these notice requirements leads to a forfeiture of the remedy of tuition reimbursement.⁶ The Appeals Panel Opinion correctly points out, however, that the regulatory provision is discretionary, instructing that a tuition reimbursement remedy “may be reduced or denied” (emphasis added) if notice is not given.⁷ And the case law cited in the Appeals Panel Opinion is not binding on Pennsylvania courts or on this hearing officer.⁸

While the parents’ dissatisfaction with the District was no secret, I do find that the parents acted in such a way that they were hiding from the District the fact that they had been actively pursuing a private placement for months prior to the removal of the student from the District. (FF 15, 17). In fact, in the eyes of the parents, the fact that the student attended the neighborhood middle school at the start of the 2008-2009 school year was only to preserve an attendance record, and compliance with the District program, in an effort to be accepted at the private school.⁹

Still, this failure of notice does not, in the mind of this hearing officer, dispose of parents’ claim for tuition reimbursement. In this case, there must be a substantive examination of the parents’ tuition

⁶ PA Spec. Educ. Appeals Panel Opinion 1872 (March 25, 2008).

⁷ *Id.* at page 16; *see* 34 C.F.R. §300.148(d).

⁸ PA Spec. Educ. Appeals Panel Opinion 1872 at page 16, notes 115 and 116.

⁹ NT-January 29th at pages 226-227.

reimbursement claim under the long-standing three-step Burlington-Carter analysis¹⁰, which has been incorporated implicitly in IDEIA.¹¹

In this three-step analysis, the first step is an examination of the school district's proposed program. If it is found to be appropriate, no further analysis is necessary because the school district has met its obligation to provide FAPE to the student. If it is found to be inappropriate, however, the second step is an examination of the appropriateness of the private school program which the parents have selected. If the private school program is found to be inappropriate, no further analysis is necessary because the parents have failed to provide what they claim the school district did not provide. If the private school program is appropriate, however, the third step is an examination of the equities of the situation, to determine if tuition reimbursement is a fair remedy and, if so, in what amount.

In this case, I find that the District's proposed program of May 2008 is appropriate. The re-evaluation report of May 2008 is comprehensive and appropriate. (FF 11). Nothing in the goals or specially designed instruction is lacking. And the District has shown flexibility in the location of the delivery of the student's IEP, standing ready to implement the program at the neighborhood school or at the Academy. (FF 13). Because the District has met its burden to offer an IEP reasonably calculated to yield meaningful education benefit, and in doing

¹⁰ See, at note 4, Burlington and Carter.

¹¹ See 34 C.F.R. §§300.148(a),(c),(d)(3).

so provide the student with FAPE¹², there is no need to move to the second step of the Burlington-Carter analysis.

CONCLUSION

The District, through its proposed IEP of May 2008, has offered a program designed to provide the student with FAPE. As such, the parents' claim for out-of-pocket tuition expenses for the private school attended by the student for the 2008-2009 school year is denied.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the parents' claim for tuition reimbursement for the 2008-2009 school year is denied.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

March 3, 2009

¹² Board of Education v. Rowley, 458 U.S. 176 (1982).