

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING

Name of Child: Student
ODR #9419/08-09 AS

Date of Birth:
Xx/xx/xx

Dates of Hearing:
March 31, 2009
June 8, 2009
August 5, 2009
September 1, 2009

CLOSED HEARING

Parties to the Hearing:

Lower Merion School District
301 E. Montgomery Avenue
Ardmore, Pennsylvania 19003

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Michael Connolly
Connolly, Jacobson & John
188 North Main Street
Doylestown, Pennsylvania 18901

Amy Brooks, Esquire
Wisler Pearlstine
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October 6, 2009

October 19, 2009

Linda M. Valentini, Psy.D., CHO

Background

The Student¹ is a primary grades aged student who is eligible for special education services under the classification of speech/language impairment. The Student's Parents unilaterally placed the Student in a private school and requested this hearing seeking tuition reimbursement which the District had denied.

Issues

Did the Lower Merion School District fail to offer an appropriate program and placement for Student for the 2008-2009 school year?

If the Lower Merion School District failed to offer an appropriate program and placement for Student for the 2008-2009 school year, was the placement unilaterally chosen by the Parents appropriate?

If the Lower Merion School District failed to offer an appropriate program and placement for Student, and the placement unilaterally chosen by the Parents was appropriate, are there equitable considerations that would remove or reduce the District's obligation for tuition reimbursement?

Findings of Fact

1. Student is a primary grades-aged eligible student residing in the Lower Merion School District. The Parents first suspected that Student had a disability around age two when Student was not talking; Student had four or five words at age two-and-a-half. [NT 34]
2. The Parents started Student in speech/language therapy at about age two-and-a-half. Student continued private speech therapy, usually twice a week, and then once a week when kindergarten started, including participation in summer preschool speech/language classes two or three days a week with six children, one speech therapist and two assistants. At times Student was receiving from 12 to 15 hours of speech/language therapy a week. [NT 36, 49-50, 1041-1042, 1053-1055]
3. Student displayed a very dense or complex language disorder, impacting not just one or two areas but all areas of language. Despite having at least average intelligence and speech/language therapy continuously from age two-and-a-half-years through kindergarten the language skills gap did not close. [NT 1024, 1048-1049]

¹ The name, age, gender and current school of the Student is not used in this decision in order to preserve the Student's privacy.

4. Shortly before Student's third birthday a neurologist at a local hospital for children diagnosed the Student with oro-motor apraxia². [NT 35-36; J 26]³
5. A psychological evaluation performed privately in March 2008 using the Wechsler Preschool and Primary Scale of Intelligence – Third Edition [WPPSI III] found a 40-point spread between Student's Performance score [IQ 110 High Average Range] and Verbal score [IQ 70 Borderline Range]. This is, according to the District's psychologist, a large or significant discrepancy that is not typical for a student with a speech/language delay. [NT 255, 257; HO-2]
6. A psychological evaluation performed in July 2008 by the District using the Pictorial Test of Intelligence – Second Edition, an instrument that minimizes the child's need for verbal language response as only pointing is required, resulted in a Total Test standard score of 102, equivalent to a non-verbal IQ. The District psychologist opined that this score was a low estimate of Student's cognitive abilities as items were administered orally to Student and Student's difficulties in language comprehension/processing adversely affected Student's scores on this cognitive assessment just as these same difficulties had affected the achievement test administered by the private evaluator. [NT 263, 270; J-13, HO-2]
7. The District psychologist noted that in addition to showing up on formal testing Student's difficulty with processing language was apparent in regular conversation in the one-to-one testing situation when Student did not understand what was being asked. [NT 286; J-13]
8. A private speech/language evaluation performed in June 2008 using the Clinical Evaluation of Language Fundamentals – Preschool 2 found Student at the 0.5 percentile in word structure, the 1st percentile in sentence structure, the 2nd percentile in word classes- expressive and word classes – total, the 5th percentile in expressive vocabulary, concepts and following directions, and word classes – receptive, and the 9th percentile in recalling sentences. [J-5]
9. Summary scores on the CELF Preschool 2 were the 0.5 percentile on Core Language, and the 1st percentile on Receptive Language, Expressive Language, Language Content and Language Structure. Student presented with a significant deficit across all aspects of speech/language development despite several years of intensive speech/language therapy. [NT 1034-1035; J-5]
10. The private speech/language evaluator diagnosed Student with a Mixed Expressive-Receptive Language Disorder. [J-5]
11. The District performed a speech/language evaluation in July 2008. On the Comprehensive Assessment of Spoken Language (CASL) Student received a Core Composite Language Score of 73. An average score would be 100. Student

² Encompasses oral-motor apraxia; the terms were used interchangeably in the hearing. [NT 1016-1017]

³ The parties cooperated in providing Joint Exhibits.

- scored a 73 on a test of expressive language [EVT] and a 75 on a test of receptive language [PPVT]. [J-13]
12. The District's Evaluation Report was provided to the Parents sometime between July 30, 2008 and August 12, 2008. [J- 13, J-14]
 13. The District's Evaluation Report concluded that Student possessed at least average range cognitive abilities and demonstrated at least average early academic skills, but that Student's performance on speech/language assessments indicated that Student's skills were "not sufficient for making progress in the general education curriculum setting without intervention". [J-13]
 14. At one point in preschool the private speech/language pathologist and the Parents thought that Student might be better served in a more intensive setting, so application was made to the language enrichment preschool program at a local college's child development program. However, Student was determined to be inappropriate for the program because of the severity of Student's language delay. [NT 1013-1014, 1069]
 15. Student attended a private kindergarten in a class of six students, chosen because the program was a full day kindergarten program. [NT 37, 1044]
 16. In the kindergarten class of six children Student had daily difficulties related to Student's speech/language disability, including becoming frustrated at Student's inability to communicate. Student was still seeing the private speech/language therapist once a week. [NT 38, 43-44, 50-52; J-1]
 17. The Parents explored the program in a private school for children with learning differences in spring 2008 prior to 1st grade but the school rejected Student because Student's speech/language delay was too significant. The private school wrote: "The amount of support and intervention [Student] needs is significantly more than we can provide, even in this very small classroom setting. [NT 67-68; J-2]
 18. The Parents enrolled Student in the District on May 7, 2008 and also contacted the private school where Student is now currently enrolled. [NT 56, 69]
 19. As the Parents were given the impression that there was high demand for a few slots at the current private school they were willing to secure Student's place at the private school by signing a contract, thinking that if the District offered an appropriate program another child would take the slot and they could be released from the contract. The Parents were willing to forego the \$2,650 non-refundable deposit in order to have a place saved for Student as Student had been rejected from two previous specialized settings because of the severity of Student's speech/language disability and they did not know what the District could offer. [NT 73-75]

20. On August 13, 2008, citing IDEIA requirements, the Parents provided the District written notice of their intent to enroll Student in the private school. However, they also clearly stated, “Again, if we are able to develop an appropriate program and placement for [Student] at our August 26th meeting⁴, as we hope we can, proceeding with private placement as described above will not be necessary.” [J-14]
21. The teacher who would have taught Student in 1st grade in the District has certifications in regular education, special education and as a reading specialist. She has not been employed as either a special education teacher or a reading specialist. She has been a regular education 1st grade teacher for nine years, two of these years being in the District. [NT 430]
22. The teacher in the proposed classroom, over her nine years of teaching 1st grade, has had about fifteen children with IEPs; she has had three or four children with speech/language only IEPs. [NT 461-462, 532]
23. The classroom proposed for Student has 19 children; Student would have been the 20th. [NT 429, 432]
24. The classroom has the one teacher, and one aide. However the aide serves as the one-to-one staff person for a single child and does not assist the entire class. [NT 432, 486]
25. The classroom Student would have entered had two children with IEPs; one child has multiple learning needs and one has emotional needs. [NT 435]
26. The teacher in the proposed classroom did not see the private speech/language report or the private psychological report prior to or during participation in the IEP meeting. She did not see the District’s ER prior to participating in the IEP meeting. [NT 436-437]
27. The teacher would have been responsible for implementing all the goals on the IEP. [NT 440]
28. The teacher assumed that the baselines for Student’s goals were independent of prompts for following directions. [NT 441-442]
29. The teacher’s classroom is rich in visual material and she uses a variety of non-verbal signals for the class. [NT 450; J-37]
30. In order to be able to respond to or provide a non-verbal signal for not understanding something asked of the class of 20, Student would have to

⁴ A scheduled IEP meeting.

- recognize that Student did not understand what was being required. [NT 451-452]
31. The teacher provides one-to-one or small group instruction to children in the context of the 20-child class by having the rest of the children work independently in small groups. When the children are working independently in the small groups they are supposed to ask one another in the group if they do not understand something, or ask another group, before interrupting the teacher. [NT 456-458, 486-487]
 32. The District's speech/language therapist testified that class size is irrelevant to her decisions regarding speech and language services, when there are no other issues involved. [NT 983]
 33. The private speech/language therapist testified that one of the biggest issues [in deciding on a placement for Student] was the class size. [NT 1021]
 34. The private speech/language therapist opined that given Student's less developed vocabulary skills, Student's very slow processing speed, Student's history of being frustrated when not understanding things and given Student's need for many accommodations in a typical school setting, Student's program would put "huge demands" on the regular classroom teacher. [NT 1038-1039]
 35. The prospective teacher testified that Student would be given a peer to assist Student in the cafeteria lunch line if Student needed help. [NT 493]
 36. The teacher has the children transition from one activity to another or to one location in the room to another every 15 minutes. [NT 501]
 37. One of the two special education supports the District's IEP offered to Student in the context of the 20-children regular education classroom was one 30-minute session with the itinerant learning support teacher daily. The regular education teacher viewed this 30 minutes as consultation for herself. The learning support teacher also viewed her role as consultative, and as acting as an observer and data-gatherer, but would also assist Student if needed. [NT 458-460, 554, 562]
 38. The other special education support the District's IEP offered to Student were three 30-minute speech/language periods weekly. One period would be a pull-out individual session, and the other two periods would be push-in sessions during which the speech/language therapist would work individually in the classroom with Student assisting with whatever the class was working on. [J-20]
 39. Following the IEP meeting at which the parties reviewed a draft IEP, the District issued a finalized IEP dated August 26, 2008 which the Parents received on or about September 7, 2008. [NT 92; J-18, J-20]

40. The District issued a NOREP dated August 27, 2008. The Parents rejected the NOREP on September 10, 2008. [J-21]⁵
41. The Parents enrolled Student for 2008-2009 in the private school which issued an initial educational plan and a revised educational plan. [J-30, J-42]
42. The private school is a small private school licensed by the Pennsylvania Department of Education to provide special education to students from grade one through twelve. [NT 607]
43. Most of the private school's student body consists of students with language-based disabilities, as well as attention/focus issues and some with social cognition issues. [NT 608-609]
44. Student's 1st grade private school classroom had 12 to 13 students, and two certified special education teachers. (N.T., at 746)
45. Most of the instruction in the private school is done in a setting of no more than six to seven children with at least one, if not two, special education teachers. Often Student's instruction was provided in an even smaller instruction setting (e.g., two students to one teacher) or on a one-to one basis. The program at the private school also provides Student with a language enriched environment, and uses a variety of research-based instructional methodologies and programs throughout the day. [NT 753-757]
46. A speech/language therapist and an occupational therapist provided push-in services to Student's private school classroom. [NT 746-747]
47. At the private school Student receives three forty-five minute individual speech therapy sessions per week, and weekly social skills instruction to address pragmatic language needs. [NT 746-747, 759-760]
48. Student made progress in the private school program, especially given Student's significant language delays. [NT 781-817; J-44, J-51, J-52]

Discussion and Conclusions of Law

Legal Basis:

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, for cases brought under the IDEA, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as

⁵ Originally the draft IEP was sent in error to the Parents; the correct revised IEP was sent later. [NT 92]

well more recently. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. In the instant matter, the evidence is not in equipoise as the Parents presented preponderant evidence on the issues.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.⁶ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. Credibility will be addressed in the discussion below

FAPE: Having been found eligible for special education, Student is entitled by federal law under IDEIA, and by state law under the Pennsylvania Special Education Regulations, to receive a free appropriate public education (FAPE). FAPE is defined in part as special education and related services: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP). 20 U.S.C. §1401(9); 34 C.F.R. §300.17; 22 PA Code § 14 *et seq.*

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). Districts need not provide the optimal level of service, maximize a child's opportunity, or even offer a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman, supra.

⁶ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Tuition Reimbursement:

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress. Parents who believe that a district's proposed program or placement is inappropriate may unilaterally choose to place their child in what they believe is an appropriate placement. The IDEA's implementing regulations at 34 C.F.R. §300.148 (c), make it clear that tuition reimbursement can be considered under specific conditions:

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency⁷ enroll the child in a private...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 FAPE available to the child in a timely manner prior to that enrollment...”

Before becoming a matter of statute, the right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

Then, in 1997, a dozen years after Burlington, the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(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 school without the consent of or referral by the public agency, a court or 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 has not made a

⁷ The United States Supreme Court in Forest Grove School District v. T.A., 129 S. Ct. 2484 (2009) recently concluded that a student need not have received special education services in a public school before being eligible for tuition reimbursement. The District did not raise this issue and note is simply being made for informational purposes.

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)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Discussion:

With regard to the first prong for tuition reimbursement under Carter, the District did not offer Student an appropriate educational program and placement to address the severe nature of Student's speech/language disability. The testimony offered by the mother and by the private speech/language therapist was credible and compelling. [FF 1, 2, 3, 4, 14, 17] The Parents met their burden of proof by clearly establishing that Student has a severe speech/language disorder that is not typical even for children with speech/language disabilities. Despite three years of early and intensive speech/language therapy individually and in a specialized summer preschool program, testing in spring 2008 showed Student to have language scores at or below the first percentile and a highly significant 40-point differential between verbal functioning and non-verbal functioning on a cognitive test, with the verbal score being one point removed from the deficient range while the non-verbal score was one point into the high average range. The District's psychologist, who provided credible and competent testimony, agreed that this discrepancy was significant and not typical even for speech/language disabled students. [FF 5]

This hearing officer had a great deal of difficulty with the District's speech/language therapist's testimony and must agree with the points made in the Parents' closing argument regarding this witness, who tortuously tried to minimize the severity of the Student's handicap, presumably in defense of the District's program and placement. Her statement that class size is irrelevant if speech/language is the sole disability was simply not credible; her testimony was given very little weight, in contrast to that of the private speech/language evaluator's very credible testimony. [FF 32, 33] Student, highly supported by private speech/language therapy, had a very difficult time in preschool and kindergarten, even in a classroom with a six to one student teacher ratio. [FF 2, 15, 16]

The District's proposed placement, with its twenty to one student teacher ratio, was not appropriate. Not only did the teacher not have a teaching aide for the entire classroom of twenty 1st graders, she also conducted small group instruction while the rest of her students were working independently. [FF 23, 24, 30, 31] Her sanguine belief that she could offer Student one-to-one instruction or clarification as needed in this context may have been related to her not having read any of the evaluation reports prior to the IEP meeting; her testimony regarding the appropriateness of her classroom for Student was given little weight. [FF 26, 27, 28]

It is possible that with sufficient supports and services the proposed classroom could have been appropriate in terms of the least restrictive environment, but the supports offered were simply too few. Given Student's severe disability, 30 minutes of special education consultation to the regular education teacher with dual responsibilities for observing and collecting data and only one-to-one work with Student as needed, did not provide sufficient specialized instruction. [FF 37] Likewise, although the two push-in speech/language sessions weekly would be expected to be very helpful when they were actually occurring, Student would have been left to depend on the teacher's recognizing the need for help, or on garnering a peer's assistance, the rest of the time. [FF 38] Finally, given the slow yield of individual speech/therapy over a period of several years, the proposition that one individual pull-out session weekly is sufficient to meet the legal standard for appropriateness is not supportable. The District's proposed classroom seemed to be a rich, well-run setting for children of broadly average intelligence without severe special needs unless the special needs child was very highly supported. [FF 21, 29, 35] Unfortunately for Student the proposed placement simply offered too large a setting with too few staff and far too few special education supports and services.

Since the District did not fulfill its obligation to offer Student an appropriate program and placement, the second prong of the Carter analysis must be reached. The program and placement unilaterally selected by the Parents is appropriate. The private school offers a small educational environment with day-long research-based specialized instruction designed to meet Student's unique needs. Additionally, it provides Student with sufficient individual speech/language therapy to address Student's extensive needs for remediation. [FF 42, 43, 44, 45, 46, 47, 48]

Since the District did not fulfill its obligation to offer Student an appropriate program and placement, and the program and placement unilaterally chosen by the Parents is appropriate, the third prong of the Carter analysis must be considered. The Parents' early search for a placement for Student given Student's previous rejection by a specialized preschool and a specialized private school is understandable. [FF 14, 17] The mother's testimony about their decision to lose the private school enrollment deposit, and risk being held responsible for the contract, was credible and persuasive on the point that the Parents would have accepted an appropriate placement in the District had one been offered. [FF 18, 19, 20] There are no equitable considerations sufficiently persuasive to remove or reduce the District's obligation for tuition reimbursement.

Order

It is hereby ordered that:

1. The Lower Merion School District did not offer Student an appropriate program and placement for the 2008-2009 school year.
2. The placement unilaterally chosen by the Parents was an appropriate educational placement to address Student's speech/language impairment.
3. The equities do not reduce or eliminate the District's obligation to provide tuition reimbursement.
4. The Parents are entitled to reimbursement for their unilateral placement of Student at the private school.

October 19, 2009

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Pennsylvania Special Education Hearing Officer
NAHO Certified Hearing Official