

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

Child's Name: AB

Date of Birth: XX/XX/XX

Dates of Hearing:
February 10, February 17, March 19 & April 28, 2009

CLOSED HEARING

ODR Case #
9414-08-09-AS
9486-08-09-AS
(consolidated cases)

Parties to the Hearing:

Mr. & Mrs.

Ms. Jean Purnell
Waynesboro Area School District
210 Clayton Avenue
Waynesboro, PA 17268

Date Record Closed:

Date of Decision:

Representative:

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May 19, 2009

June 3, 2009

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”) is a teen age student residing in the Waynesboro Area 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 multiple issues related to the evaluation of the student, Student’s individualized education plans (“IEPs”) and educational placement.

The District filed its complaint at 9414-08-09-AS regarding the evaluation of the student. The parents then filed a complaint at 9486-08-09-AS regarding claims of inappropriate IEPs. By agreement of the parties, the cases were consolidated for hearing purposes due to an overlap in issues and witnesses.

ISSUES

Is compensatory education owed for the 2007-2008 and 2008-2009 school year for alleged failures on the part of the District?

Is the District’s last-offered IEP, to be implemented at the District’s high school, appropriate?

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.

If not, are parents entitled to a prospective private placement?

Are parents entitled to reimbursement for an independent educational evaluation?

FINDINGS OF FACT

1. Student is a teen age student residing in the Waynesboro Area School District.
2. Student was identified as a student with a disability, specifically Asperger's Syndrome, in 2004 and 2005. Student also has experienced needs in speech and language. (Parents' Exhibit ["P"]-1, P-2).
3. The IEP for the 2006-2007 school year contained goals in communication and social skills. (P-6).
4. Parents claim that bullying and peer harassment of Student have been severe and ongoing since Student has attended District schools. (NT at 580-581, 624-625, 641-642, 677-678, 685-688, 730-731, 866-869).
5. The District claims that there was nothing in the interaction of District witnesses and Student to lead them to conclude that Student was being bullied or enduring harassment. (NT at 240-242, 371-372, 379, 473-474, 496).

6. In the spring of 2007, Student had seven disciplinary incidents involving other students, resulting in four verbal reprimands, two detentions and two in-school suspensions. (P-11, P-12, P-13; School District Exhibit ["S"]-11).
7. A re-evaluation report in September 2007 reiterated the findings and conclusions of the previous evaluation report and IEPs. (P-15).
8. The IEP for the 2007-2008 school year, issued in October 2007, contained goals in communication and social skills. The IEP notes that Student had significant difficulties with various types of speech and social interaction. While Student made progress in highly structured communication settings, Student had difficulty transferring these skills to real-life situations. Both parent and teacher reports from the spring of 2007, included as part of Student's present levels of functional performance, note that Student had difficulty with peer interaction. (P-16).
9. In October 2007, Student was involved in a disciplinary incident with another student, resulting in a detention. (P-17; Notes of Testimony ["NT"] at 444-445).
10. Student's teachers in the 2007-2008 school year uniformly remarked on the adequacy of Student's social skills, and social skills growth, in their observation and experience with Student that school year. (S-15).

11. In April 2008, Student was involved in a disciplinary incident with another student, resulting in one day of in-school suspension. The principal who handled the incident testified that she did not notice anything unusual in Student's behavior in response to the incident or the meeting with her. Upon returning home from school that day, however, Student became upset and took a knife from the kitchen, threatening to harm self. (P-20; S-11; NT at 445-450, 688-689).
12. Student was admitted to a partial hospitalization program. (P-21; S-8).
13. Over the spring and summer of 2008, multiple physicians, including the director of the partial hospitalization program, a treating psychiatrist, and Student's pediatrician, opined that Student required home schooling or homebound District instruction. Student received homebound instruction for the remainder of the 2007-2008 school year. (P-21, P-29, P42.3, P-42.4; S-6, S-8, S-14).
14. In August 2008, Student's IEP team met, and parents requested an independent education evaluation, a request which the District denied on the grounds that the parents did not comply with District procedures to secure an independent evaluation. At this time, parents also informed the District that it was interested in a private placement at district expense. (P-42.9, P-42.10; S-3).

15. Student began the 2008-2009 school year on homebound instruction by District teachers or contracted teachers and remained on homebound instruction for the entire school year. The District sought and received special permission from the Pennsylvania Department of Education to exceed the regulatory number of hours of homebound instruction it could offer to Student. (S-22; NT at 894-910).
16. On October 15, 2008, the District proposed an IEP for the remainder of the 2008-2009 school year (and the 2009-2010 school year through the annual review date). (S-2).
17. In October 2008, the District issued a re-evaluation report which recognized Student's ongoing needs in speech and language but cast some degree of doubt on the diagnosis of Asperger's Syndrome. The District re-evaluation report also indicated that the educational team believed that a psychiatric evaluation should be pursued. (P-34; S-1).
18. The District evaluator noted that Student's behavior, communicativeness and openness seemed to change markedly when conversations turned to interactions with and/or information about Student's mother. (P-34 at pages 7-8, 13).
19. The parents' private evaluator also issued an independent educational evaluation report in October 2008. The independent evaluator agreed with the District evaluation that Student does not

- exhibit the characteristics of a student with Asperger's Syndrome. The independent evaluator diagnosed Student with a specific learning disability in written expression with speech and language impairment. (P-35; S-5).
20. The private evaluator noted that on multiple assessments of social and emotional behavior, there was wide disparity between how Student was rated by Student's mother and by Student's teachers. (P-35 at pages 20-23; S-5 at pages 20-23).
21. On the Behavior Assessment System for Children (2nd edition), mother's ratings and teachers' ratings varied significantly. On the following scales, composites and indices, Student's mother rated Student clinically significant or at risk while Student's teachers' rated Student as normal: clinical scales, adaptive scales, externalizing problems composite, internalizing problems composite, adaptive scales composite, and behavioral symptoms index. (P-35 at pages 20-21; S-5 at pages 20-21).
22. Mother's rating and teachers' rating matched each other on one sub-test of the Behavior Assessment System for Children. On the social skills sub-test in the adaptive scales portion, all raters scored Student as at risk. (P-35 at page 21; S-5 at page 21.)
23. The private evaluator noted that on the Adaptive Behavior Assessment System, mother's ratings and teachers' ratings varied significantly. On the sub-tests where both mother's and teachers'

- ratings were gauged (communication, community use, functional academic, health and safety, self-care, and self-direction), the mother's scores were rated as extremely low in all sub-tests except one (functional academic) which rated as borderline. Teachers' sub-test scores in these areas, on the other hand, were rated uniformly as average. (P-35 at pages 22-23; S-5 at pages 22-23).
24. Student's general adaptive composite score as rated by Student's mother on the Adaptive Behavior Assessment System places Student in the extremely low range at <.1%. The conceptual composite and practical composite scores as rated by Student's teachers place Student, respectively, in the average range (68th%) and the above average range (77th%). (P-35 at page 22; S-5 at page 22).
25. Summarizing the data of the mother/teacher rating assessments, parents' private evaluator notes: "(t)here is a significant disconnect between mother's report and teachers' perceptions of Student's functioning. While teachers view Student as having average to above average functional daily living skills, mother reports that Student functions within an Extremely Low range across all domains." (P-35 at page 23; S-5 at page 23).
26. Parents' private evaluator notes in her overall summary and recommendations that "(t)here are significant discrepancies between mother's perception of Student's strengths and needs and

- teachers' perceptions of Student's functioning and this examiner's subjective observations of Student in the standardized testing situation was closer to what teachers' observe than what mother reports." (P-35 at page 24; S-5 at page 24).
27. On January 7, 2009, a psychiatric report was issued by a child and adolescent psychiatrist. The report noted that Student's concerns about socializing and bullying in the school environment were not as elevated as mother's. The evaluator opined that Student "does not meet criteria for an autism spectrum disorder at this time". (S-4).
28. On January 19, 2009, the District sought permission to evaluate Student to update the speech and language assessments, last performed in the spring of 2007. Parents did not grant permission. (S-32; NT at 917-918).
29. Parents are seeking a placement for Student at a local private school that provides regular education but no special education. (P-42.14, P-44; NT at 871-873, 923).
30. The District is seeking to implement its last proposed IEP in a regular education setting at the District high school. (S-2).
31. All evidence in this matter supports the fact that Student is academically strong achieving mostly As and Bs and at the advanced level in reading and mathematics on Student's 8th grade PSSA testing. (S-1, S-5, S-16, S-20, S-21).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law.² To assure that an eligible child receives a free appropriate public education,³ an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”⁴ ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning.”⁵ More specifically, a student’s IEP must include specially designed instruction designed to meet the unique needs of the child and must be accompanied by any necessary related services to permit the child to benefit from the instruction.⁶

Additionally, both federal law and Pennsylvania law require that the placement of a student with a disability be in the least restrictive environment (“LRE”).⁷ Pursuant to the federal mandate:

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the

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

³ 34 C.F.R. §300.17.

⁴ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁵ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁶ Rowley; Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993).

⁷ 34 C.F.R. §§300.114-120; 22 PA Code §14.145; see also Oberti and L.E. v. Ramsey Board of Education, 435 F.3d. (3rd Cir. 2006).

disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁸

Pennsylvania law requires that a school district ensure that “to the maximum extent appropriate, and as provided in the IEP, (a) student with a disability is educated with nondisabled peers.”⁹

Compensatory Education

In this case, the District has offered programs in the 2007-2008 and 2008-2009 school years that are reasonably calculated to yield meaningful education benefit. The IEPs for those school years provide adequate goals for instructing Student in Student’s most significant area of need—social skills and communication. (FF 8, 14). In fact, Student succeeded quite well academically. (FF 30). More importantly, however, Student appeared to make adequate progress in social skills in the 2007-2008 school year. (FF 10). As for the 2008-2009 school year, the District’s homebound instruction may not have been perfect, but it made a good faith attempt to provide Student’s 9th grade curriculum through District teachers and contracted teachers, including seeking special permission from the Pennsylvania Department of Education to double the number of regulatory hours of homebound instruction it could offer. (FF 15).

⁸ 34 C.F.R. §300.114(a)(2).

⁹ 22 PA Code §14.145(1)

What makes the issue of appropriate programming somewhat convoluted is the duality of the evidence regarding Student's needs. It is clear that Student has a degree of need in communication and social skills. (FF 2, 7, 8). These skill deficits may have played a role in certain disciplinary incidents in a school setting. (FF 6, 9, 11). But Student's teachers are consistent and clear in their anecdotal and objective assessments of Student's needs in the school environment, namely that Student has limited needs for support (although there is certainly evidence that Student's teachers perceive some degree of need in social skills). (FF 5, 8, 10, 21, 22, 23, 24, 25, 26). Student's mother's views of Student's needs, however, could not be more disparate, namely that Student shows deep social, communication, and behavioral deficits across the board. (FF 4, 18, 20, 21, 22, 23, 24, 25, 26). The record casts two portraits of Student—one is of an average, successful student with occasional need for social skills support, the other of a student barely hanging on to any sense of appropriate social, communication and behavioral outcomes. The opinions of the District school psychologist and, importantly, the parents' own evaluator carry significant weight in balancing these two views of Student. (FF 18, 26). It is the considered opinion of this hearing officer, taking all of the evidence in the record in its entirety, that the type of support Student needs is accurately and appropriately reflected in the programming in the District's IEPs.

The record in its entirety supports the conclusion that the District offered and implemented an appropriate IEP for Student in the 2007-2008 school year and offered an appropriate IEP for the 2008-2009 school year. In doing so, the District provided Student with a free appropriate public education.

Accordingly, there will be no award of compensatory education.

Appropriateness of 2008-2009 IEP

As intimated above, the last-offered IEP by the District, proposed in October 2008, is appropriate. The present levels of functional performance in terms of Student's speech and language needs are outdated, but the District has proposed to re-evaluate Student to garner new data on Student's speech and language abilities. (FF 28). The goals, again, are reasonably calculated to yield meaningful education benefit, and the specially designed instruction is appropriate in light of those goals. (FF 16). And the District had accounted for Student's transition back to the District, should homebound instruction have ended during the 2008-2009 school year. (FF 16).

This is not to suggest that the IEP proposed in October 2008 for the 2008-2009 school year is appropriate for the upcoming 2009-2010 school year. As indicated in the preceding paragraph, there needs to be an updated evaluation of Student's speech and language needs.

Furthermore, the comprehensive and detailed report of the parents'

private evaluator was not available to the IEP team at the time the last-offered IEP was proposed. Finally, there is mounting evidence in this record that Student may have been misdiagnosed as a student with Asperger's Syndrome. (FF 17, 19, 27). It seems imperative that the IEP team convene to consider all of the data contained in the evaluation reports that have been issued (or may be issued) since the October 2008 IEP was proposed.

A critical factor at this juncture is the very explicit question of whether Student is a student with Asperger's Syndrome. While that diagnosis has been with Student for a number of years (FF 2, 7), Student's most recent evaluation history—by the District school psychologist, by the parents' private evaluator, and by a board-certified child/adolescent psychiatrist—all strongly support the notion that Student may have been diagnosed as a young child.¹⁰ All rather emphatically assert that Student is not a student with Asperger's Syndrome or a student on the autism spectrum. (FF 17, 19, 27). Weighing the record in its entirety, and giving special consideration to

¹⁰ The psychiatrist who evaluated Student opined as to the potential source of the misdiagnosis: "Although Student has been previously diagnosed with Asperger's Disorder, I feel that much of this is based on [Student's] early issues with speech and language, which had a more significant impact on [Student's] social functioning during [Student's] younger years. On presentation today, Student did not demonstrate any impairment in social interactions or impairment in use of non-verbal communication skills. There is no evidence of stereotypical patterns of behavior, restricted range of interest, or difficulties with transitions. Therefore, [Student] does not meet the criteria for an autism spectrum disorder at this time." S-4 at page 5.

the assessments and opinion of the parents' private evaluator,¹¹ it is the considered opinion of this hearing officer that Student is not a student with Asperger's Syndrome.

Accordingly, the IEP proposed by the District in October 2008 was appropriate at the time it was drafted and offered to the parents. The provisions of this order will set forth requirements and guidance regarding the necessity for the IEP team to meet and design Student's program for the 2009-2010 school year.

Reimbursement

Parents claim reimbursement for (a) the independent education evaluation they procured and (b) prospective tuition reimbursement for a placement at a private school. As to the first claim, parents are entitled to reimbursement for an independent evaluation when they disagree with a school district evaluation and the school district evaluation is found to

¹¹ The parents' private evaluator found the same mother/teacher duality in rating Student on the Asperger's Syndrome Diagnostic Scale and the Gilliam Asperger's Disorder Scale—mother rated Student as having significant symptoms of Asperger's Syndrome with the probability of having Asperger's high whereas Student's teachers rated the likelihood of Asperger's as very unlikely. P-35 and S-5, both at page 24. Additionally, the parents' evaluator wrote: "During the current assessment, this examiner did not observe Student demonstrating any qualitative impairment in social interaction or abnormal use of multiple non-verbal behaviors, such as eye-to-eye gaze, facial expressions, body postures or gestures to regulate social interaction. Furthermore Student did not evidence restricted, repetitive or stereotypical patterns of behavior, interest or activity; encompassing preoccupation with one or more areas of interest to an abnormal level of intensity; inflexible adherence to specific non-functional routines; stereotypic (sic) and/or repetitive motor mannerisms; or clinically significant social impairment....Based upon Student's history...this examiner does not believe that Student meets the diagnostic criteria to be classified as a [Student] with an Autistic Spectrum disorder...." P-35 and S-5, both at pages 23-26.

be inappropriate.¹² In this case, the District, as allowable under the IDEIA, filed its due process complaint, in part, to uphold its appropriateness in light of parents' request for an independent educational evaluation.¹³ (FF 14, 19). The District's evaluation report is appropriate and so the parents' request for reimbursement will be denied. (FF 14).

As to the second claim, parents claim that a prospective private placement is appropriate for Student. (FF 29). There are two aspects to analyzing a parental 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).”¹⁴ In this case, it is clear that the parents had put the District on notice as early as August 2008 that it was not going to send Student back to the District high

¹² 34 C.F.R. §300.520(b)(1-2).

¹³ 34 C.F.R. §300.520(b)(2)(i).

¹⁴ 34 C.F.R. §300.148(d)(1).

school and that it had specific intent to seek a private placement at public expense. (FF 14, 29). Thus, the substantive analysis of the tuition reimbursement claim must be performed.

The substantive examination of the parents' tuition reimbursement claim is undertaken with the long-standing three-step Burlington-Carter analysis,¹⁵ which has been incorporated implicitly in IDEIA.¹⁶ In this three-step analysis, the first step is an examination of the school district's proposed program. If the school district's IEP is found to be appropriate, no further analysis is necessary because the school district has met its obligation to provide a free appropriate public education to the student. If the school district's IEP 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.

¹⁵ 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).

¹⁶ 34 C.F.R. §§300.148(a),(c),(d)(3).

In this case, as outlined above, I find that the District proposed an appropriate IEP for the 2008-2009 school year. Therefore, the Burlington-Carter analysis ends at the first step.

Accordingly, parents' claims for reimbursement for the independent educational evaluation and for tuition for the private placement are denied.

CONCLUSION

The District has not failed in its obligation to provide a free appropriate public education to Student in the 2007-2008 or 2008-2009 school year. The District does not owe compensatory education as a result of parents' claims. Additionally, the District does not owe reimbursement for either the independent education evaluation obtained by parents or tuition for a private school placement for Student.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the Waynesboro Area School District has provided a free appropriate public education to Student in the 2007-2008 and 2008-2009 school years. The Waynesboro Area School District does not owe parents reimbursement for the independent education evaluation the obtained or tuition for a private placement.

Furthermore, under the terms of this order, Student is deemed not to be a student with Asperger's Syndrome or an autism spectrum disorder.

No later than 60 calendar days of the date of this order, the Waynesboro Area School District shall conduct, or shall arrange to have conducted, a comprehensive speech and language evaluation of Student . Within 10 calendar days of the issuance date of the speech and language evaluation report, the IEP team shall convene to discuss and design the IEP for Student for the 2009-2010 school year.

The IEP team shall consider all evaluations and data gathered since the IEP team last met in the late summer/fall of 2008 in its consideration of Student 's eligibility and programming.

The IEP team shall design a program to be implemented in the least restrictive environment for Student , specifically the [location redacted], the school Student would attend if Student were not diagnosed with a disability.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

June 3, 2009