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Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

Closed Hearing

ODR File Number

25127-2021

Child's Name

M.E.

Date of Birth

[redacted]

Parents

[redacted]

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Hearing Officer

Michael J. McElligott, Esquire

Date of Decision

11/17/2021

Introduction

This special education due process hearing concerns the educational program and placement of M.E. ("student"), a student who resides in the Abington School District ("District").¹ The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEIA")² as a student who requires special education. Parents also bring a denial-of-FAPE claim under the Rehabilitation Act of 1973, particularly Section 504 of that statute ("Section 504").³

As the result of the student's disability profile, the student has long attended a private placement. This placement was agreed upon by the student's parents and the school district where the family formerly resided. In October 2020, the family relocated to the District. The student's placement was maintained at the private placement for the remainder of the 2020-2021 school year.

In March 2021, the District re-evaluated the student, a process which ultimately resulted in a proposal of educational programming by the District where the student would return to the District for programming and

¹ The generic use of "student", and avoidance of personal pronouns, are employed to protect the confidentiality of the student.

² It is this hearing officer's preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. See *also* 22 PA Code §§14.101-14.162 ("Chapter 14").

³ It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. See *also* 22 PA Code §§15.1-15.11 ("Chapter 15").

placement. Parents rejected the District's proposed program/placement and continued the student's enrollment at the private placement in the current 2021-2022 school year. Through their special education due process complaint, filed in late June 2021, the parents seek tuition reimbursement for the continuing private placement.

The District counters that its proposed program and placement are appropriate for the student. Therefore, the District argues, parents are not entitled to tuition reimbursement.

Issue

Are parents entitled to tuition reimbursement for the student's private placement in the 2021-2022 school year?

Findings of Fact

All evidence in the record, both exhibits and testimony, was considered. Specific evidentiary artifacts in findings of fact, however, are cited only as necessary to resolve the issue(s) presented. Consequently, all exhibits and all aspects of each witness's testimony are not explicitly referenced below.

1. The student has a rare genetic condition that results in a wide array of developmental delays, including cognitive delays, motor functioning

delays, language and communication delays, and social delays.

(Parents Exhibit ["P"]-44, P-55; Notes of Testimony ["NT"] at 66-205, 344-392, 784-811).

2. The student underwent a private evaluation in April 2017. (P-1; NT at 224-325).
3. The student was identified for early intervention services through the local intermediate unit ("IU") as a student with autism. (P-8).
4. As a preschooler, the student attended the private placement at the center of parents' claim. (P-7, P-8, P-11, P-14; NT at 66-205).
5. The student was last re-evaluated by the IU in May 2018. (P-8).
6. In March 2019, as part of the transition to school-age services, the student was re-evaluated by the school district where the family resided at that time. (P-36; School District Exhibit ["S"]-10; NT at 66-205).
7. The school district identified the student as a student with autism and a health impairment. (P-17).
8. While enrolled in that school district, the student continued at the private placement in the 2019-2020 school year. (P-20, P-22; NT at 66-205).
9. In August 2020, anticipating a relocation by the family into the District, the District observed the student at the private placement. (S-30; NT at 66-205).

10. The family began to reside in the District in October 2020. (NT at 66-505).
11. The District continued to support the student in the private placement in the 2020-2021 school year. (P-29; NT at 1201-1294).
12. In January 2021, the District requested, and parents provided, permission to re-evaluate the student. (P-33).
13. In March 2021, the District issued its re-evaluation report ("RR"). (P-36; S-10).
14. The March 2021 RR noted the student's diagnoses, including the genetic condition, autism, and global developmental delay. (P-36; S-10).
15. The March 2021 RR included summaries of prior evaluations. (P-36; S-10).
16. The March 2021 RR included parental input. (P-36; S-10).
17. The March 2021 RR included content from the latest progress reporting, through January 2021, at the private placement. (P-36; S-10).
18. The March 2021 RR included input from providers at the private placement and observations by a District school psychologist. (P-36; S-10).
19. The March 2021 RR included a cognitive/readiness assessment. The student had difficulty engaging in the standard format of the

assessment and the evaluator noted that a degree of caution was necessary in reviewing the results of the assessment, although ultimately the evaluator opined that the results “are considered a valid measure of (the student’s) current functioning, at this time”. (P-36 at pages 11-12; S-10 at pages 11-12).

20. The overall cognitive developmental quotient in the cognitive assessment in the March 2021 RR placed the student at the .3 percentile. The sub-domain scores in attention and memory, reasoning and academic skills, and perception and concepts were all <1.0 percentile. All scores were in the “significantly delayed” range. (P-36; S-10).

21. The results of the cognitive assessment in the March 2021 RR were summarized as follows: “(R)esults of assessment indicate that (the student’s) cognitive functioning indicate significant difficulty processing cognitive information in the service of learning, problem solving, and higher order reasoning. (The student) also presents with significant deficits in receptive and expressive communication, as (the student) is nonverbal and has significant difficulty understanding and processing what is verbally and nonverbally communicated....”. (P-36 at page 13; S-10 at page 13).

22. The March 2021 RR included adaptive, and social/emotional/behavior, assessments. (P-36; S-10).

23. The student's mother and private-placement teacher each completed adaptive behavior scales. Both rated the student at <1.0 percentile in the adaptive behavior composite and the communication, daily living skills, and socialization domains. (P-36; S-10).
24. The student's mother and private-placement teacher each completed behavior rating scales. (P-36; S-10).
25. Both rated the student as clinically significant in the withdrawal, social skills, leadership and functional communications sub-scales. Both rated the student as clinically significant in the adaptive skills index. The mother's ratings were markedly more elevated across most of the remaining sub-scales and indices. The student's mother and private-placement teacher each completed adaptive behavior scales. Both rated the student at <1.0 percentile in the adaptive behavior composite and the communication, daily living skills, and socialization domains. Additionally, where rating scales were ascertained through the teacher only, the teacher rated the student as clinically significant for study skills and at-risk for learning problems. (P-36; S-10).
26. The student's mother and private-placement teacher each completed an executive functioning assessment. (P-36; S-10).
27. Both rated the student as "not elevated" on the emotional control index and "extremely elevated" on the problem-solving index. The raters were split on the attentional control, behavioral control, and

overall executive functioning indices, with the mother's ratings in the "extremely elevated" range and the teacher's ratings in the "not elevated" range. (P-36; S-10).

28. The student's mother completed an autism-rating assessments, with the total autism-rating score in the "very elevated" range. (P-36; S-10).
29. The March 2021 RR included a functional behavior assessment ("FBA"). (P-36; S-9, S-10).
30. The March 2021 RR included a speech and language ("S&L") assessment. Standardized testing, or instrument-based assessment, were not employed as part of the S&L assessment. Instead, the S&L evaluator's results were based on record-review, observation, and parental input. The S&L evaluator concluded that the student utilized assistive technology to indicate "I need help" but did not initiate communication without prompting. The student would respond to edible reinforcers and physical prompts but "focus and attention appear to be a significant barrier to consistent progress." (P-36 at page 26; S-10 at page 26).
31. The March 2021 RR included a physical therapy ("PT") assessment. Standardized testing, or instrument-based assessment, were not employed as part of the S&L assessment. Instead, the S&L evaluator's results were based on record-review, observation, and

parental input. The evaluator recommended direct PT services to address needs in balance, coordination, and gross-motor play skills (with an emphasis on safety in terms of these needs). (P-36; S-10).⁴

32. The March 2021 RR included an occupational therapy (“OT”) assessment. The OT evaluator utilized record-review, observation, and parental input. The OT evaluator also had the student’s teacher complete a sensory-processing assessment. (P-36; S-10).
33. The OT evaluator opined that the student required direct OT services for fine-motor and visual-motor needs (including self-feeding and self-care) and for sensory needs (including registering sensory input, auditory processing, and the need for elevated levels of attention from educators. (P-36; S-10).
34. The March 2021 RR concluded that the student should be identified as a student with an intellectual disability, a health impairment, S&L impairment, and vision impairment. (P-36; S-10).
35. The March 2021 RR identified needs, in relevant part, in expressive and receptive communication, balance/coordination/gross-motor skills, fine-motor and visual-motor skills, life skills (including self-feeding and self-care), basic pre-academic skills (matching, sorting, discriminating), and improved social skills. (P-36; S-10).

⁴ At this point in the March 2021 RR, a vision therapy assessment was also performed. The student’s need to wear glasses and generalized vision supports in school settings were emphasized. (P-36; S-10).

36. In April 2021, the student's individualized education program ("IEP") team met to discuss the student's IEP. (P-38; S-12).
37. The IEP team considered various aspects of the IEP. The parents were deeply concerned at the April 2021 IEP meeting about safety issues regarding certain building features (playground, door-locking) at the District school where the student would attend. (NT at 66-205, 1201-1294; P-38 at pages 3-4; S-12 at pages 7-8).
38. In April 2021, after the IEP meeting, the student's mother observed the District's proposed placement. (NT at 66-205).
39. In May 2021, educators from the District toured/observed the private placement. (829-936).
40. In late May/early June, educators from the private placement, the student's treating neuro-developmental pediatrician, and treating neuro-geneticist all provided letters to the District, through parents, all opining that the student should remain at the private placement. (P-43, P-44, P-45; NT at 784-811).
41. In June 2021, the private evaluator who issued the April 2017 private report provided an updated private report, opining that the student should remain at the private placement. (P-46; NT at 224-325).

42. In late June 2021, the parents filed the special education due process complaint that led to these proceedings. (Hearing Officer Exhibit 1).
43. In July 2021, the student's IEP team met to discuss and revise the student's IEP. The July 2021 IEP is the District's proposed program/placement for the student for the 2021-2022 school year. (P-48; S-19).
44. The July 2021 IEP contains present levels of educational/functional performance (through the January 2021) from the private placement in the following goal areas: community goals in progressing through a dental examination and a haircut, fine motor skills (building blocks and object manipulation), gross motor skills (obstacle course), self-care goals (use of cup, use of fork and spoon, accepting nail care, toileting⁵, teeth-brushing), imitation, reduction of maladaptive behaviors, pre-academic skills (attending to instructor, pointing, matching), and following directions. (P-48; S-19).
45. The July 2021 IEP contains present-level information from the March 2021 RR. (P-48; S-19).
46. The July 2021 IEP contains 10 goals in the following areas: attending to instructor, letter identification/matching, object-number

⁵ The student is toilet-trained at the private placement but not in the home environment. (NT at 66-205, 520-589).

matching, shape-sorting, expressive language using picture-exchange communication or voice-output device, receptive language using matching task, use of fork and spoon, utensil/object grasp, gross-motor skills (balance and coordination), negotiating stairs, self-care (teeth-brushing, hand-washing, nasal care, toileting), and dressing (jacket, zippering, shoes). (P-48; S-19).

47. The District's instruction of the student would include a multi-layered instructional model which utilizes various instructional components (applied behavior analysis, verbal behavior, direct instruction, and skill-mastery). (S-23; NT at 613-683).

48. The instructional model proposed by the District involves in-depth training of educators and pairing/building rapport between those educators and students, followed by assessments in the instructional areas of the model (participating, problem-solving, listening, observing, talking [communicating], reading, writing). This pairing and assessment process takes multiple weeks. (S-23; NT at 613-683).

49. The July 2021 IEP proposes individual OT/PT/S&L services, small group S&L services, a 1:1 aide, and weekly support by a behavior specialist. (P-48; S-19).

50. The July 2021 IEP contains extended school year (ESY) programming for the summer of 2022. (P-48; S-19).

51. The July 2021 IEP proposes a full-time placement entirely in autism support/life skills support. (P-48; S-19).
52. The July 2021 IEP contains behavior goals (reduction in minor-protest behavior, turn-taking, transition from preferred to non-preferred activity, task-persistence), a positive behavior support plan, and safety plan to address aggression, self-injurious behavior, elopement, and climbing. (P-48; S-19).
53. The parents rejected the program and placement outlined in the July 2021 IEP. (P-49; S-20).
54. In early August 2021, the parents informed the District that it was seeking to return the student to the private placement and advising that District that it would be seeking tuition reimbursement for the private placement. (P-54; S-22).
55. In early August 2021, the private placement proposed an IEP for the student's continuing instruction. (P-56).
56. The August 2021 private-placement IEP contains present levels of educational and functional performance in the following areas: pre-academic skills (eye contact, tracking, pointing, matching), self-care goals (use of cup, use of fork and spoon, accepting nail care, toileting, teeth-brushing), expressive and receptive language, maladaptive behaviors (aggression, tantrum), community goals in progressing

through a dental examination and a haircut, and following directions. (P-56).

57. The August 2021 private-placement IEP contains a positive behavior support plan to address aggression and tantrums. (P-56).
58. The August 2021 private-placement IEP contains 22 goals in the following areas: community goals in progressing through a dental examination and a haircut, fine motor skills (building blocks and object manipulation), gross motor skills (obstacle course), self-care goals (use of cup, use of fork, use of spoon, accepting nail care, toileting⁶, teeth-brushing, hand-washing), imitation, schedule-following, use of augmentative communication device, reduction of maladaptive behaviors, pre-academic skills (attending to instructor, pointing, matching), and following directions. (P-56).
59. The private placement's instruction of the student is centered on applied behavior analysis. The instruction is offered with a teacher 1:1 and includes instruction and support in the home environment. (P-56; NT at 416-508, 520-589).
60. There are no direct OT, PT, or S&L services provided as part of the private placement programming. (P-56; NT at 66-205, 416-508, 520-589).

⁶ The student is toilet-trained at the private placement but not in the home environment. (NT at 66-205, 520-589).

61. The August 2021 private placement IEP contains ESY programming for the summer of 2022. (P-56).
62. As a specialized school, the student's placement there is entirely full-time autism support. (P-56).

Witness Credibility

All witnesses testified credibly and a degree of weight was accorded to each witness's testimony. Where particular emphasis was accorded to a witness's testimony on a particular issue or event, that is pointed out above in a specific finding of fact, as applicable.

Discussion

The provision of special education to students with disabilities is governed by federal and Pennsylvania law. (34 C.F.R. §§300.1-300.818; 22 PA Code §§14.101-14.162). To assure that an eligible child receives a free appropriate public education ("FAPE") (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. (Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982)). 'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her individual needs, not simply *de minimis* or minimal education progress. (Endrew F. ex rel. Joseph F. v.

Douglas County School District, 580 U.S. , 137 S. Ct. 988, 197 L. Ed. 2d 335, (2017); Dunn v. Downingtown Area School District, 904 F.3d 208 (3d Cir. 2018)).

Additionally, in considering parents' claim, long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability (Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985); *see also* 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi)). A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated into IDEIA. (34 C.F.R. §§300.148(a),(c),(d)(3); 22 PA Code §14.102(a)(2)(xvi)).

In the three-step Burlington-Carter analysis, the first step is an examination of the school district's proposed program, or last-operative program, and whether it was reasonably calculated to yield meaningful education benefit. Step two of the Burlington-Carter analysis involves assessing the appropriateness of the private placement selected by the parents. At step three of the Burlington-Carter analysis, the equities must be balanced between the parties.

Here, the parents have carried their burden of persuasion on their tuition reimbursement claim. At step one of the Burlington-Carter analysis,

an examination of the District's proposed July 2021 IEP reveals that it is not reasonably calculated to yield significant learning in light of the student's unique needs. The prejudicial flaws in the July 2021 IEP are primarily two-fold: (1) the goals in the July 2021 IEP and the instructional model which would be used to deliver it are, in vital aspects, overly geared to academic skills which the student simply does not possess and (2) many of the goals, even where those goals are appropriate to the student's developmental level, are too compacted to allow for the segmented, focused instruction that the student requires.

The first of these can be illustrated by the proposed goals in number matching from pictured objects, or letter matching. For example, the student currently has only elementary matching skills (picture matching once in a field of three) (P-56 at page 6). The matching goal in the July 2021 IEP calls for matching letters A-J. (P-48 at page 36; S-19 at page 30). The instructional model which will be utilized by the District ultimately includes areas such as observing, reading, and writing, among others, which are beyond the student's skills level. Now, the District witnesses most familiar with this instructional model testified credibly that the model is flexible and is geared to a high degree of individuality (indeed, only after weeks of pairing and rapport-building and rigorous benchmarking within the model is the instruction operationalized). But taken as a whole, the goals and much of

the instruction in the July 2021 IEP are overly ambitious, so ambitious that it renders inappropriate those critical aspects of the IEP.

The second of those fatal flaws in the July 2021 IEP—goals which are too heavily compacted—can be illustrated by what might be called the ‘self-care’ or ‘self help’ goal: “(The student) will improve...self help skills by following steps to brush...teeth [put the toothpaste on the toothbrush, brush, and rinse the toothbrush, spit]; follow the steps of washing...hands, (nose-blowing) and use a communication device to indicate (a need) to go to the bathroom and follow steps of going to the bathroom in 8/10 consecutive trials.” (P-48 at page 44; S-19 at page 38; parentheses edited for confidentiality or clarity, bracketed material in the original). As one goal, this is simply too dense to guide effective or appropriate instruction.

Now, it must be pointed out that the July 2021 is not wholly flawed. Taken as a whole, the District’s proposed programming is appropriate in many respects. The parents’ position, generally, that the July 2021 IEP is deeply flawed, or comprehensively flawed, cannot be supported. Likewise, the District’s instructional program appears to be an excellent approach to educating children with autism, or with needs related to the autism spectrum. But in critical areas for this student, the July 2021 IEP is not reasonably calculated to yield significant learning for the student based on the student’s unique needs.

Accordingly, the parents have carried their burden of persuasion at step one of the Burlington-Carter test.

At step two of the Burlington-Carter analysis, the August 2021 private placement IEP is appropriate. The August 2021 private placement IEP contains in-depth understanding of the student's current needs (as one might expect, having educated the student for multiple consecutive school years). The IEP contains nearly two dozen goals, each addressing very concrete, segmented aspects of the student's needs. The instructional model, and staffing, employed by the private placement are all appropriate.

The only potential question about the programming at the private placement is the lack of direct OT, PT, and S&L services for the student. While this may appear to be a hole in the programming at the private placement, the August 2021 private placement IEP clearly addresses, in both goals and instruction, these areas of need. In that way, implementation of this IEP will clearly meet the needs of the student in all of these areas.

Accordingly, the parents have carried their burden of persuasion at step two of the Burlington-Carter test.

Finally, at step three of the Burlington-Carter test, there is nothing in terms of the equities between the parties which impacts the ultimate result.

Thus, tuition reimbursement will be awarded to the parents for the 2020-2021 school year.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the parents are awarded tuition reimbursement for the private placement which the student is attending in the current 2021-2022 school year. Within 14 calendar days of the date of this order, the parents shall present, through counsel, to counsel for the District proof of any payment which they have made for the 2021-2022 school year. To the extent that there is any remaining balance owed for a portion of the 2021-2022 school year, the parents, in the same way, shall present a bill for any such balance. The District shall arrange for this reimbursement and/or this balance-due payment. This order applies to programming for the 2021-2022 academic year as well as summer 2022 ESY programming at the private placement.

Parents' claim in their complaint related to the Americans with Disabilities Act are dismissed for lack of jurisdiction under 22 PA Code §§14.101-14.162 or 22 PA Code §§15.1-15.11.

Any claim not specifically addressed in this decision and order is denied and dismissed.

s/ Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

11/17/2021