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Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: R.A.

Date of Birth: <redacted>

Dates of Hearing:

September 13 & 20, 2011

CLOSED HEARING

ODR Case # 1652-10-11-KE

Parties to the Hearing:

<Parent>

Marple Newtown School District

26 Media Line Road

Suite 210

Newtown Square, PA 19073-4694

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Nancy Ryan, Esq.

McKinley & <student name>

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West Chester, PA 19382

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October 12, 2011

October 25, 2011

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

<Student name> ("student") is a _____ year old student residing in the

Marple Newtown School District ("District") who is a student with a

disability under the Individuals with Disabilities in Education

Improvement Act of 2004 ("IDEIA"). Specifically, the student is

identified with severe autism, mental retardation, and other disabilities,

The parties dispute the necessity, and therefore the appropriateness, of a

residential component for the student's educational programming.

Particularly, parent claims that a residential setting is a necessary

component for the provision of a free appropriate public education

("FAPE") for the _____ student. The District maintains that a residential setting

is necessary only for the provision of medically necessary services; as

such, a residential setting is not a necessary component for the provision

of FAPE. Alternatively, the District argues that, due to the abdication of

responsibility of other state-based and/or county-based agencies, or

other funding sources, it has been placed in a position to provide

behavior health services (including a residential component) necessary

for a provision of FAPE but which rightfully belong under the auspices of

other state-based and/or county-based agencies, or other funding

sources.

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For the reasons set forth below, I find that a residential setting is
required to provide a FAPE to the student.

ISSUES

Is a residential setting necessary for the student
to receive a FAPE?

FINDINGS OF FACT

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1. The student has been identified as a student with severe autism,

mental retardation, and other disabilities, including speech and

language disability other health impairments. (Joint Exhibit "JL-

270).
2. The student was a typically developing infant for approximately

one year. Thereafter, the student's behaviors and emerging

communication skills markedly changed. (Notes of Testimony
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["NT"] at 333-340).
3. Even as a young child, the student exhibited behaviors that posed

a danger to the student and to others, including aggressing against

mother while she was driving (necessitating police intervention),

pica", violent tantrums, and posing a danger to younger siblings.

(NT at 339-343).

2 Pica is a condition where an individual ingests items not meant for consumption. In this matter, for example, the student has ingested

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4. In the fall of 1999, the student began early intervention services.

Wraparound mental health services were provided to the student,

increasing consistently from 30 to 40 to 50 hours of in-home

services, all to little effect. The level of problematic behaviors, and

lack of progress, led the student's family to investigate more

expert-level diagnostics and services. (J-1, J-10; NT at 339-343,

350).

5. Throughout the fall of 1999 and winter of 2000, the family sought

expert-level diagnostics and services from Children's Hospital of

Philadelphia and Kennedy-Krieger Institute in Maryland

("Kennedy-Krieger"). The Kennedy-Krieger team found the student

to have singularly unique and challenging needs, which ultimately

led to multiple publications based on the student's profile. In a

residential setting at Kennedy-Krieger, the student exhibited

aggression (biting, scratching, hitting, property destruction),

elopement concerns, and pica. Restraints were often employed for

the safety of the student and others. (J-2, J-3, J-4, J-5, J-6, J-6a,

J-6b, J-6c; NT at 343-344).

6. Throughout the winter, spring, and summer of 2000 at Kennedy-

Krieger, the student received behavioral health services, and

problematic behaviors were reduced from approximately 250 per

day to approximately 20 per day. In July 2000, Kennedy-Krieger

wires/cords, paperclips, a razor blade, and bleach/other cleaning products. (NT at 369, 376-377).

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opined that the student should not be discharged to home but only

to a facility setting. (J-11, J-11a, J-11b, J-11c, J-11d, J-11e, J-

11f; NT at 343-344, 350-351).

7. Transitioning the student from one environment or routine to

another has always proved deeply challenging. At Kennedy-Krieger,

during a community outing with the student's mother, it took half

a day to transition the student from a subway stop back to

Kennedy-Krieger due to the exhibition of dangerous behaviors and

the need to employ behavior protocols. (NT at 348).

8. Anticipating discharge from Kennedy-Krieger, in spring 2000, the

student was school-aged, and so mother began working with the

District on the student's educational programming. The District

agreed that the student required residential programming. In

considering various programs, the students individualized

education plan ("IEP") team found no options available in eastern

Pennsylvania. Eventually, a placement was secured at

School (1

) in New Jersey. The District issued a notice of

recommended assignment in July 2000, developed an IEP, and the

student began to attend

(J-7, J-7a, J-12, J-13, J-13a, J-

14, J-15; NT at 351-353).

9. Initially, the student entered

's neuro-behavioral unit,

followed by a transition to

t's residential program with an

educational component. At first, the District paid for the entire

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placement, including its residential component. On appeal of the

denial of funding for services by a county-based assistance

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provider, Magellan Services ("Magellan"). Magellan paid for services

at

(J-15; NT 353-357).

10.

Again, the student exhibited elevated levels of problematic

behaviors due to transitions. The transition from Kennedy-Krieger

to

led to an increase in aggression. Elopement and pica

were constant safety concerns. The student posed a constant

danger to

self and others during transportation to and from at-

home visits, including kicking, head-banging, and attempted

interference with the vehicle driver. (NT at 355-362).
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11.

The student remained at

for approximately seven

years, from 2000 through 2007. The IEP team would meet

regularly, recommending that the student's placement at

continue, and the student made progress on IEP goals over that

time. (See generally the 73 exhibits from J-14 through J-22; NT at

358-359).

12. In spring 2007, due to concerns over the quality of services

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at the student left (NT at 362-366).

13. After leaving the student was without any

placement for a handful of months, living at home without any

supports or services. Given the transition, the student again

exhibited deeply problematic behaviors dangerous to the student

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and to others, including aggression, insomnia, elopement, pica

behavior (mainly bleach and other toxic substances), attempting to

crawl out a bedroom window. (NT at 368-371).

14. In May 2007, the student began to attend a facility called

After a review of the student's profile,

admitted

the student to its residential program, but a space was not

immediately available. For three months, the student attended the

day program at

Again, transitions were terribly difficult,

this time on a daily basis. The student exhibited deeply

problematic behaviors during transportation and upon arrival,

including resistance, aggression (causing a herniated disc in

mother's neck from hair-pulling) and head-banging.

staff

began to greet the student upon drop-off with crash pads. At times,

the staff waited for up to two hours for the student to exit the

vehicle at the student's own pace. (J-23, J-23a, J-23b, J-24C, J-

24d; NT at 371-374).

15. In July 2007, was able to move the student into its

residential setting. Deeply problematic behaviors continued to be

exhibited, including aggression and pica behavior. Approximately

one-and-a-half years passed before the student regained the level

of progress the student exhibited at]

(NT at 376-378).

16. The student made progress on IEP goals and behavioral

goals while at

The student can sit in a chair for

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approximately 15 minutes and attend to tasks, has greatly

diminished attempts at elopement (from 10 times per hour to once

per hour), shows less aggression in transitions back to

instead of aggressing can indicate "yes" or "no" as to preferred or

non-preferred activity, and enjoys routine work assignments and

tasks such as cleaning dishes, floor-sweeping, mail delivery, and

sorting of recyclable materials. (See generally the 51 exhibits from

J-23e through J-26n; NT at 379-386, 438-439, 442-443).

17. Even with progress in certain areas, transitions continued to

be difficult for the student. After a particularly aggressive and

violent episode on a community outing with mother and stepfather,

the student no longer makes community visits. (NT at 386-392).

18. While at the District funded the educational

component of the student's program and Magellan funded the

residential component. The student's mother testified that, over

the years, there was regular and intense pressure from Magellan to

end its funding. Magellan reduced the review period for the

student's eligibility from every 120 days to every 90 days. (NT at

395-399, 425).

19. Over the fall 2010, appeals of Magellan's decision to end

funding because the student had "stabilized" were successful, but

Magellan persisted in seeking to end its funding of the student's

residential component, including a reduction in the review period

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from every 90 days to every 60 days. (J-27, J-27a, J-27b, J-27c, J-

27d, J-27e, J-27f, J-27g, J-27h; NT at 401-407, 425).

20. At a December 2010 interagency coordination meeting,

Magellan made it clear that it did not see the need to continue

funding a residential component for the student, and the District

was resistant to funding a residential component. (J-27h; NT at

402-405, 446-449).

21. In addition to reducing the length of its review period,

Magellan employed a number of strategies to place the student in a

position where it could claim the student no longer required a residential component, including increasing the criteria for retaining a residential component from four criteria to six; the offer of in-home therapeutic support which, when accepted by parent, was used as a reason by Magellan to argue against the need for a residential component; parent training ostensibly for the student's home visits but used as a reason by Magellan to argue against the need for a residential component. (NT at 407-414, 417-421).

22. In January 2011, the District, not having evaluated the student for some years, requested permission to evaluate the student. (J-27i; NT at 404).

23. The student's IEP goals included four self-care goals

(washing, teeth-brushing), one community goal (shopping), one communication goal, one goal for domestic chores,

one social skills goal (turn-taking with peers), one pre-vocational goal (package delivery), and three academic goals (recognizing the student's name, task acquisition skills and gross motor modeling).

All but one of these goals is labeled in the IEP as "residential" or

"residential/educational", meaning instruction and/or assessment

of the goals is solely or in part in the residential setting. (J-26k,

Hearing Officer Exhibit ("HO")-4).

24. In March 2011, the student's mother filed a special

education due process complaint, seeking to maintain the

residential component of the student's program in the light of the

positions taken by Magellan and the District.

25. In June 2011, upon motion of the parent, this hearing officer

issued an interim ruling maintaining the student's placement at

as the pendent placement, pending the outcome of this

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hearing. (HO-8).

26. Any transition for the student is difficult and dangerous. The

student requires regularity, structure, and routine to maintain a

semblance of behavioral stability. Additionally, due to elopement,

pica behavior, and lack of any danger-reflex, the student requires

one-on-one assistance with trained personnel always at arm's

length. (NT at 392-395, 418, 422, 426-427, 434-435, 443-444).

DISCUSSION AND CONCLUSIONS OF LAW

To assure that an eligible child receives a 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"

(Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not

simply de minimis or minimal education progress. M.C. v. Central

Regional School District, 81 F.3d 389 (3rd Cir. 1996).

The student has severe communication and behavioral needs. (FF

1, 3, 5, 23, 26). To be available for instruction, the student requires a

residential component for the delivery of the student's IEP. (FF 4, 5, 6,

11, 13, 16, 23). The critical aspect to this finding is the long-standing

and deeply problematic issue the student has with transitions, especially

physical transitions between environments or settings. (FF 3, 7, 10, 13,

14, 15, 17). Indeed, the student's difficulty with transitions makes the

prospect of delivering necessary services, whether educational services or

behavioral health services, in a non-residential setting or through a

transportation-driven schedule would be wholly inappropriate.

Because of this, the provision of educational services with a

residential component is necessary for the delivery of a FAPE for the

child. Instructive in this regard is the reasoning of the hearing officer in

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the special education decision at K.H. v. Marple Newtown School District,

01716-1011 (May 23, 2011). There, the two cases cited by each party in

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the instant case in support of their positions are explicated persuasively.

F.2d 687, 694 (3d Cir. 1981). It is an older case, but still good law, a case

where the reasoning and holding support the parent's position in this

dispute, namely the fact that a residential placement that may provide

other needs (in the instant case, behavioral health services) does not

necessarily negate its appropriateness, or necessity, for the provision of

FAPE.³

Yet in support of the District's position, it cites to *Mary Courtney T.*

V. School District of Philadelphia, 575 F.3d 235 (3rd Cir. 2009). There, the

Court clearly held that parents could not be reimbursed for a residential

placement that served a purely medical, or more broadly non-

educational, purpose; indeed, the placement in *Mary Courtney T.*

provided no educational services at all. In this case, however, a

residential component is a requirement for the student to receive FAPE:

not only is it the only means to make the student available for

instruction but even the goals in the student's IEP are written for

³ And IDEIA envisions that a residential setting, where necessary for the delivery of FAPE, must be provided to a student: "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.104.

The student clearly requires a residential component for the delivery of FAPE. And while it is not within the jurisdiction of this hearing officer to make findings regarding the delivery of behavioral mental health services for non-educational purposes, this decision cannot be issued without passing commentary on the machinations of funding agencies outside of the District to avoid provision of, or sharing in, residential costs for this student. (FF 8, 9, 18, 19, 20, 21, 26). Based on the totality of the evidence provided in this voluminous record (in terms of the number of exhibits), it seems to this hearing officer to border on incredulity for a non-educational agency to assert that the student does not require a residential setting for the delivery of behavioral health services.

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CONCLUSION

The student requires a residential setting for the provision of FAPE.

ORDER

In accord with the findings of fact and conclusions of

law as set forth above, the student requires a residential

setting for the provision of a free appropriate public

education.

Any claim not addressed in this decision and order is

denied.

Jake McElligott, Esquire

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Jake McElligott, Esquire
Special Education Hearing Officer

October 25, 2011