

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACHARY HARR, a minor, by his
parents, J. HUGH HARR AND
KATHLEEN HARR,
Plaintiffs,

v.

NESHAMINY SCHOOL DISTRICT,
Defendant

:
:
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NO. 01-3491

MEMORANDUM AND ORDER

McLaughlin, J.

April 28, 2003

Kathleen Harr and J. Hugh Harr (the "parents") filed this action against the Neshaminy School District (the "district") on behalf of their son, Zachary Harr. Zachary was sixteen years old when this case was filed and eligible for special education services under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 et seq., as a student diagnosed with attention deficit/hyperactivity disorder. The parents claim that the district did not provide an appropriate placement for Zachary and they, therefore, were compelled to send Zachary to a private institution, The Crefeld School ("Crefeld"). They seek reimbursement for tuition expenses at Crefeld for the 2000-01 school year.

The Court conducted a bench trial on July 8, 2002. This memorandum contains the Court's findings of fact and conclusions of law. The Court will enter judgment for the defendant and against the plaintiffs.

Zachary last attended a district school in the sixth grade (1996-97). He was removed by his parents from public school after grade six and placed in a private school, The Learning Studio. Part way through grade nine, he was transferred to Crefeld. The parents sought reimbursement from the district for tuition for The Learning Studio in an earlier due process hearing and were awarded reimbursement for 50 percent of the tuition paid for the 1997-98 school year. The parents filed an action in this Court for counsel fees pertaining to that award. The Court awarded counsel fees. Harr v. Neshaminy School District, No. 00-CV-4853 (E.D. Pa. Aug. 6. 2002).

During July 1999 (the summer before ninth grade), the district initiated the process to complete Zachary's biennial multidisciplinary evaluation ("MDE"). The MDE was completed and a comprehensive evaluation report ("CER") was issued on April 11, 2000. Mrs. Harr agreed with the CER. **An** individualized education program ("IEP") was completed on May 25, 2000. The parents stipulated that the IEP is appropriate and met Zachary's

needs. The parents, however, were dissatisfied with the notice of recommended assignment ("NORA") to the Neshaminy High School.

The parents sought and received a pre-hearing conference at which the district offered to provide a placement at the Neshaminy High School or pay 50 percent of the cost of Crefeld. The parents rejected the district's offer and requested a special education due process hearing on February 21, 2001. The due process hearing took place on April 17 and 18, 2001.

The Hearing Officer issued his decision on May 3, 2001. The Hearing Officer considered whether the placement offered by the District for the 2000-01 school year was appropriate. The Hearing Officer concluded that the Neshaminy School District had offered a Free Appropriate Public Education ("FAPE") in the least restrictive environment appropriate to Zachary's needs. He concluded, therefore, that the parents were not entitled to reimbursement of the Crefeld tuition or transportation costs for the 2000-01 year.

The parents filed an appeal to the Commonwealth of Pennsylvania Special Education Due Process Appeals Review Panel. The Appeals Panel issued its decision on June 13, 2001, concluding that "there is substantial and preponderant evidence that the placement proposed by the District is appropriate." The Appeals Panel, therefore, affirmed the decision of the Hearing

Officer. The parents filed this action in the nature of an appeal from the administrative process pursuant to 20 U.S.C. § 1415(i)(2)(A) (2001).

The plaintiffs requested permission to supplement the administrative record with the testimony of three additional witnesses. The Court granted the request, and the district deposed the three witnesses. The district filed a motion for summary judgment based on the administrative record and the testimony of the three additional witnesses. The plaintiffs opposed the motion, arguing that they ought to be able to present live testimony of the witnesses. Although courts often decide these types of appeals on cross motions for summary judgment,¹ the Court denied the district's motion for summary judgment and held a trial on July 8, 2002. The plaintiffs requested permission to file a post-trial brief, which they did on September 3, 2002.

¹ See Patricia P. v. Bd. of Educ. of Oak Park, 203 F.3d 462, 466 (7th Cir. 2000); Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 82 (3d Cir. 1999); Capistrano Unified Sch. Dist. v. Wartenburg, 59 F.3d 884, 892 (9th Cir. 1995); Coale v. State Dep't of Educ., 162 F.Supp.2d 316, 322-23 (D. Del. 2001); T.R. ex rel. N.R. v. Kingswood Township Bd. of Educ., 32 F.Supp.2d 720 (D.N.J.1998).

I. Standard of Review

In authorizing judicial review of administrative proceedings, the IDEA instructs that the district court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i) (2)(B) (2001). The district court should afford "due weight" to the administrative proceedings. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

The Third Circuit has described the standard of review to be used by a district court:

[T]he question of the weight due the administrative findings of facts must be left to the discretion of the trial court. The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 758 (3d Cir. 1995)

(quoting Town of Burlington v. Dep't of Educ., 736 F.2d 773, 791-

92 (1st Cir. 1984)); see also Carlisle Area Sch. v. Scott P., 62 F.3d 520, 527 (3d Cir. 1995); Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993). If the district court chooses to depart from the agency's ruling, it should provide some explanation for its departure. Carlisle, 62 F.3d at 527. A district court must not substitute its own notions of sound educational policies for those of the school authorities under review. Rowley, 458 U.S. at 206.

11. Substantive Legal Principles

The issue is whether the parents are entitled to reimbursement for private school tuition for the 2000-01 school year. The Supreme Court has established a three-part test to determine whether a special education student is entitled to reimbursement for placement into a private school: (1) whether the public school placement that had been provided or offered for the child was an appropriate placement under the terms of the IDEA; (2) whether the private school placement chosen by the parents was an appropriate placement under the IDEA; and, (3) whether a balancing of equitable considerations favors reimbursement (this three-part test is hereinafter referred to as the "Burlington-Carter Test"). See Florence County Sch. Dist. Four et al. v. Carter by and through Carter, 510 U.S. 7 (1993);

Sch. Comm. of Town of Burlington v. Dep't of Educ., 471 U.S. 359 (1985); Susquenita Sch. Dist. v. Raelee S. by and through Heidi S., 96 F.3d 78 (3d Cir. 1996), reh'g denied, suggestion for reh'g en banc denied; Bd. of Educ. of East Windsor Reg'l Sch. Dist. v. Diamond in (sic) Behalf of Diamond, 808 F.2d 987 (3d Cir. 1986).

The first step of the Burlington-Carter test is a determination of whether the public school district has offered the student an appropriate placement for the year in question. Zachary's placement for the 2000-01 school year was contained in the IEP and NORA issued on May 25, 2000. The Hearing Officer and the Appeals Panel concluded that the placement offered by the district provided Zachary with FAPE in the least restrictive environment.

At the due process hearing, Zachary's mother, Kathleen Harr, testified that she was satisfied with the content of the IEP. Her only concerns, and the reasons she rejected the IEP and continued Zachary's placement at Crefeld, was the actual location of the class at the Neshaminy High School.

The Hearing Officer made the following findings of fact pertaining to the May 25, 2000 IEP and the placement at the

Neshaminy High School:

59. Neshaminy High School has a program with small group instruction, with two teachers and an aide. The program has behavioral supports specifically designed for the needs of the child. The staff, including counselor, psychiatrist and psychologist, meet regularly to discuss student's program. A behavior specialist visits the class weekly. Zachary's academic needs and behavior needs can be met in the program. The program is flexible and allows for participation in regular classes. (N.T. 55, 56, 57, 58, 65, 76, 77, 90, 118, 138).

The Appeals Panel affirmed the Hearing Officer. The Appeals Panel wrote:

The placement proposed by the District is **one** that is tailored and sufficiently flexible to enable Zachary to benefit from his educational program in the least restrictive environment of the District high school. More specifically, the suggested placement provides **for** small group instruction with the necessary behavioral supports delivered by teachers and staff who are certified and experienced, and who have access to such additional assistance and training as may be required.

The parents make two challenges to these findings. One is that Neshaminy High School is not a proper placement for Zachary because Zachary had a bad experience at Neshaminy Middle school in the sixth grade. The second is that they should be allowed to withdraw their stipulation that the IEP was

appropriate because of a misrepresentation by the district of the level of intervention intended by the IEP.

In support of their first challenge, the parents presented the testimony of Dr. Jeffrey Fine, a licensed psychologist. Dr. Fine testified about his treatment of Zachary during the period 1996-2000. He diagnosed Zachary as having attention deficit hyperactivity disorder. During the spring of **1997**, he observed that Zachary also had adjustment disorder with anxiety features and was depressed. Dr. Fine thought that the depression was related to problems Zachary was having at Neshaminy Middle School.

Dr. Fine saw Zachary on a weekly basis during the spring of **1997**, Zachary's last semester at Neshaminy Middle School. He saw Zachary once a month or once every three weeks during the fall and winter of **1996-97**. He recalled that Zachary expressed relief at being at The Learning Studio. Dr. Fine expressed his concern about Zachary's returning to Neshaminy School District because of Zachary's prior experience with the district. Dr. Fine knew nothing about Neshaminy High School, however. For that reason and because of his general inability to be specific about his treatment or conclusions, the Court did not **find Dr. Fine's conclusions very helpful. Zachary had been away** from Neshaminy Middle School for three years in May 2000 when the

IEP was completed. The suggested placement was to the high school, not the middle school. The Court, therefore, concurs in the findings of the Hearing Officer and the Appeals Panel that Neshaminy School District was an appropriate placement for Zachary.

In support of their second challenge, the parents argue that they should be able to challenge the IEP, notwithstanding their earlier stipulation that it was appropriate, because of misrepresentations during the IEP meeting. Mrs. Harr raised this issue during the due process hearing. Both the IEP and NORA describe the level of service for Zachary as "supportive." The NORA describes the placement of Zachary "in the Regular Instructional Environment." The IEP states that "Zachary can participate with regular students in all areas."

At the hearing, the district witness testified that it was the intention of the district to have Zachary start in an in-house alternative education program that is a self-contained class of about five students. Initially all academic and behavioral needs would be met in that class. As Zachary had success, his involvement in regular education classes could be added. The first review of Zachary's progress would be in 30 days.

Mrs. Harr testified at the due process hearing that there was no discussion of the in-house alternative program and that she understood the IEP and NORA to mean that Zachary would spend the day in regular education. The district witnesses testified that the in-house alternative education program was discussed by the IEP team at the IEP meeting. The Hearing Officer found that the testimony of the district witnesses that there was a discussion of the intent of the word "supportive," as the level of intervention to be credible. The Hearing Officer found the terminology in the **NORA** not accurate but the inaccuracy was not a fatal flaw.

During the trial in this Court, the parents presented the testimony **of** Robin Andreotti. Mrs. Andreotti testified that there was no discussion at the IEP meeting about Zachary's being placed in a self-contained classroom. I did not find Ms. Andreotti credible. Her testimony was often incoherent. She appeared hostile. She at times did not answer the defendant's questions. **I**, therefore, accept the findings **of** fact **of** the Hearing Officer as the Court's findings of fact on this issue. I conclude that the in-house alternative program was discussed at the IEP meeting. The parents, therefore, cannot revoke their stipulation that the IEP was appropriate.

Even without the parents' stipulation, however, I reach the same conclusion. There is more than a preponderance of the evidence that the IEP was appropriate and that the district offered a FAPE in the least restrictive environment.

An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACHARY HARR, a minor by his
parents, J. HUGH HARR AND
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v.

NESHAMINY SCHOOL DISTRICT,
Defendant

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NO. 01-3491

ORDER

AND NOW, this 28th day of April, 2003, after holding a bench trial on July 8, 2002, and upon consideration of the plaintiffs' post-trial memorandum, it is hereby **ORDERED** that the Court awards judgment for the defendant and against the plaintiffs for the reasons stated in a memorandum of today's date.

BY THE COURT:


MARY A. MCLAUGHLIN, J.

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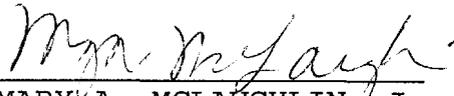
NESHAMINY SCHOOL DISTRICT,
Defendant

NO. 01-3491

ORDER

AND NOW, this 28th day of April, 2003, upon
consideration of the plaintiffs' motion for attorney fees (Docket
No. 21) and their addendum to this motion, it is hereby ORDERED
that said motion is DENIED because the plaintiffs did not prevail
in this case. This case is closed.

BY THE COURT:



MARY A. MCLAUGHLIN, J.