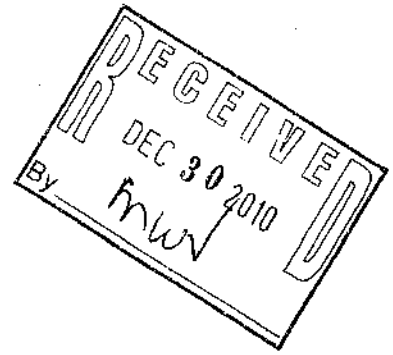


Pennsylvania
Special Education Hearing Officer



DECISION

ODR No. 01650-1011AS

Child's Name: [REDACTED]

Date of Birth: [REDACTED]

Date of Hearing: 12/ 9/2010

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

[REDACTED]
[REDACTED]
[REDACTED]

Parent Attorney
Mark Voigt, Esq.
Plymouth Meeting Executive Campus
600 W. Germantown Pike, Suite 400
Plymouth Meeting, PA 19462

School District
Nazareth Area
One Education Plaza

School District Attorney
David Conn, Esq.
331 E. Butler Avenue
New Britain, PA 18901

Date Record Closed:

December 15, 2010

Date of Decision:

December 30, 2010

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

There is no dispute in this case that [REDACTED] (Student), currently a [REDACTED] year old pupil in the Nazareth Area School District high school, is IDEA eligible and appropriately receives numerous special education services from the District. Student's multiple disabilities arose from a traumatic injury that occurred at birth and for which Parents recently agreed to a monetary settlement in a medical malpractice case.

Quite unusually, the dispute in this case is closely related to the settlement of Parents' court action and implicates the requirement that the appropriate public education the District is required to provide for Student must be at no cost to the Parents, *i.e.*, the "Free" component of FAPE. The essential question in this case is whether the District is presently liable for repaying the Pennsylvania Department of Public Welfare (DPW) for funding the District received for some of the services it provided to Student. DPW is asserting a lien against the medical malpractice settlement, seeking reimbursement of those funds.

A short hearing session was held in this matter on December 9, 2010 and the parties submitted legal argument in support of their respective positions. For the reasons explained below, the District will be ordered to immediately relieve Parents of all responsibility for the welfare lien.

ISSUE

Is the Nazareth Area School District presently required to repay the Pennsylvania Department of Public Welfare for a lien asserted against Parents but arising from payments the District received from DPW to provide services to [REDACTED]?

FINDINGS OF FACT

1. [REDACTED] (Student) is a [REDACTED] year old child, born [REDACTED]. He is a resident of the Nazareth Area School District and is eligible for special education services. (Stipulation, N.T. p. 10)
2. Due to a traumatic injury at birth, Student has significant disabilities that affect his educational progress. (N.T. pp. 28, 29, 40, 41)
3. At the District's request, Parents signed consent forms to permit the District to obtain Medicaid funding through the Pennsylvania Department of Public Welfare for medically necessary services that are also part of Student's educational program. (N.T. pp. 32, 33; P-16)
4. After Parents commenced a medical malpractice claim against the doctors that delivered Student, their attorney in that case was notified that DPW had certain statutory rights that could be asserted when a medical assistance recipient instituted an action against an alleged tortfeasor, including seeking repayment of medical assistance payments from an award or settlement. (N.T. pp. 42, 43; P-18)
5. Parents were not fully aware of the implications of the DPW information until they obtained a settlement of the malpractice claim and were informed that DPW was asserting a lien in the amount of approximately \$50,000.00. (N.T. pp. 42—44)
6. Parents were informed that if they obtained the settlement funds, deposited them into a special needs trust but refused to pay the DPW lien, Student would receive no additional medical benefits through DPW until the settlement funds were exhausted. (N.T. pp. 45—47, 64, 76; P-34, p. 32b)
7. No payments have been made from the settlement of the malpractice case due to the DPW lien. (N.T. pp. 62, 63, 74, 75)
8. Parents requested a DPW administrative hearing to challenge the lien, but have so far received adverse rulings, except with respect to a petition for reconsideration that was granted on November 1, 2010. Reconsideration of the substantive decision remains pending. (N.T. pp. 50, 58, 59, 65; P-19, P-20, P-21, P-23, P-24, P-25, P-26)

DISCUSSION AND CONCLUSIONS OF LAW

For several years, the District sought and received funding from the Pennsylvania Department of Public Welfare (DPW) for services provided to Student that are considered medically as well as educationally necessary. (FF 3) Payments from DPW to the District were based on Student's eligibility for Medicaid funding. To the apparent surprise of all parties, the

DPW payments to the District for services provided to Student resulted in DPW asserting a lien against Student's/Parents' recently acquired entitlement to settlement funds from the malpractice case. Whether that lien is proper and must ultimately be paid is a matter still in dispute via the DPW administrative hearing process. The immediate question here is the current effect of the lien on the family and whether responsibility for paying the DPW lien should be immediately shifted to the District.

The IDEA statute and regulations explicitly provide that a non-educational public agency that would otherwise be required to provide services to a child cannot refuse to pay for such services because they may be educational in nature, and that a school district is permitted to make use of funds from other sources of public benefits to provide services to eligible students. *See* 34 U.S.C. §300.154(b), (d)(1). There is no reason to question the District's past actions, since the record provides no basis for determining that the District did not follow all necessary procedures for properly obtaining such funding on behalf of Student, including obtaining prior consent from Parents. (FF3)

A school district's right to use an eligible child's benefits from other public funding sources, however, is subject to limitations to assure that the appropriate public education a district is required to provide remains free to the parents of an eligible child. To that end, the IDEA regulations further provide that a district may not require parents to incur out of pocket expenses arising from the district's use of a child's benefits for services that the district would otherwise have been required to provide, and may not use a child's public welfare benefits if doing so would reduce a the available lifetime benefit for a child, diminish funds available to provide services outside of school hours or lead to discontinuation of benefits. *See* 34 U.S.C. §300.154(d) (2)(ii), (iii)(A),(B),(C). In this case, it is absolutely clear from the record that the

District's use of Student's public welfare benefits, although not improper in itself, has recently created the type of situation that the regulations found in §154(d) are explicitly designed to prevent. The lien DPW is asserting for repayment of the funds the District obtained and used for educational purposes has created difficult issues for the family. Parents cannot accept and make use of the settlement funds without jeopardizing future benefits for Student until the lien issue is resolved. As a direct result of the lien, therefore, the malpractice settlement funds have not been paid to Parents and so cannot be used for services to benefit Student. (FF7) If Parents accept the settlement funds without repaying the DPW lien, DPW will discontinue Student's direct benefits until the settlement funds are exhausted. (FF 6) Further, Parents argue that if the District is not ordered to pay the lien immediately, Student may never receive the full benefit of the funds from the settlement, since the School Board could reject Parents request for reimbursement once the welfare lien is paid from the settlement funds.

The District contends that Parents' claim is premature and should be dismissed until such time as Parents are actually ordered to pay the lien, since there is ongoing litigation over whether DPW should be reimbursed. Moreover, the District contends that until and unless the District refuses Parents' request for payment if the lien must ultimately be repaid, the Parents have suffered no injury for which they should be permitted to seek redress via a due process claim. As described above, however, Parents and Student are currently adversely affected, even by the uncertainty of whether the lien must be repaid, and cannot access the settlement funds until they either obtain a favorable decision concerning the propriety of the lien or agree to pay the lien from the settlement funds. If Parents do receive the settlement funds without paying the lien, Student's other DPW benefits will be eliminated until the lien issue is resolved or until the settlement funds are exhausted. The District's use of the Medicaid funds could, therefore, lead,

at least indirectly, to Student's benefits being discontinued, in violation of §154(d)(2)(ii)(C).

Parents are being required to choose between continuing to receive public benefits or accepting the settlement funds solely because of the District's use of the Medicaid funds.

There is absolutely no question that under §154(d) of the IDEA regulations, if the DPW lien stands, the District will be required to repay the full amount of the funds it obtained through DPW to provide services for Student. Neither the letter nor the spirit of IDEA support the District's position that having received the entire benefit of the DPW funds attributable to educational services, which represents the bulk of DPW lien, the District should now expect Parents to take the laboring oar to resolve the lien, and more important, suffer the financial consequences of non-payment until the lien issue is ultimately resolved.

On the other hand, however, ordering the District to pay the lien outright eliminates choices the District may want to make, and has the right to make as the party ultimately responsible for the lien if it must be paid. Consequently, the District will be ordered to either pay the lien outright or notify DPW, the court and any other party/entity that has the power to affect immediate payment of the malpractice settlement funds to Parents without adversely affecting Student's future benefits that Nazareth Area School District has been ordered to assume immediate and complete responsibility for the portion of the DPW lien attributable to educational services it provided to Student. If the District elects that course, it shall take immediate responsibility for assuring that the malpractice settlement funds are released to Parents, including providing whatever assurances DPW may require that the District will satisfy the lien if it must ultimately be paid. If the District elects to continue challenging the propriety of the lien, it shall prepare whatever documents are necessary for Parents to assign their case concerning the lien to the District, and thereafter proceed with that case in whatever manner the

District chooses, at the District's expense. If the District cannot secure immediate release of the settlement funds to Parents by any means other than by paying the lien, then it must pay the lien.

This decision is based upon both the IDEA regulations cited above and the authority of the hearing officer to fashion an appropriate remedy for a denial of FAPE. In this case, although there is no issue concerning whether the District provided appropriate services to Student, it is obvious that the services Student received are no longer entirely free due to the financial effect of the DPW lien on Parents and Student. The Court of Appeals recently noted that the remedies available for denial of FAPE to an eligible student are not limited to compensatory education or tuition reimbursement. Rather, the IDEA statute confers upon the courts broad equitable powers to fashion appropriate relief to remedy IDEA violations, subject to the requirement that any such remedy must further the purposes of the IDEA statute. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 717 (3rd Cir. 2010). By extension, hearing officers who initially consider whether an eligible student has been denied FAPE are similarly free to determine an appropriate remedy that meets the appellate court standard.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Nazareth Area School District is hereby **ORDERED** to take the following actions:

1. Notify the Pennsylvania Department of Public Welfare that the District is legally responsible for payment of the DPW lien asserted against the Salzman family's malpractice settlement funds and remit the payment immediately, or, in the alternative,
2. Notify the Pennsylvania Department of Public Welfare and any other party/entity that has the power to affect payment of the malpractice settlement funds to Parents

that Nazareth Area School District has been ordered to assume immediate and complete responsibility for the portion of the DPW lien attributable to educational services it provided to Student.

3. If the District chooses not to pay the lien outright, it shall take immediate responsibility to assure that the lien is released against the malpractice settlement funds such that Parents can receive the settlement funds no later than January 31, 2011, including providing whatever assurances DPW may require that the District will satisfy the lien if it must ultimately be paid.
4. If the District elects to continue challenging the propriety of the lien, it shall prepare whatever documents are necessary for Parents to assign their case concerning the lien to the District, and thereafter proceed with that case in whatever manner the District chooses, at the District's expense.

It is **FURTHER ORDERED** that if the District cannot secure release of the lien to assure that the settlement funds are paid to Parents by January 31, 2011 without adversely affecting future Medicaid benefits for Thomas Salzman by any means other than by immediately paying the lien, then it shall pay the lien.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

December 30, 2010