

*This is a redacted version of the original hearing officer decision. Select details may 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

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6033/05-06 AS

File Number

R.S.

Child's Name

xx/xx/xx

Date of Birth

February 16, 2006

Date of Hearing

Closed

Type of Hearing

**For the Student:**

Parents

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**For the North Hills School District:**

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Dates of Hearing:

February 16, 2006

Date Transcript Received:

February 23, 2006

Date of Decision:

March 8, 2006

Hearing Officer:

Daniel J. Myers

## **BACKGROUND**

Student is a xx year old resident of the North Hills School District (School District) with autism for whom the School District has proposed an individualized education plan (IEP) for the 2005-2006 school year. Student's parents dispute the appropriateness of that proposed IEP because they believe that it fails to comply with age-range restrictions. For the reasons described below, I find that the School District's proposed IEP is appropriate.

## **ISSUE**

Whether or not the Elementary School Life Skills program and placement offered by the School District is appropriate. In particular, the parties dispute the appropriateness of the student age ranges that will be permitted with Student in that classroom.

## **FINDINGS OF FACT**

1. Student is a xx year old resident of the School District who is described by his parents as moderately autistic. (N.T. 13, 98; SD 1)<sup>1</sup>
  - a. He does not speak spontaneously, but when prompted he will provide one or two word verbal responses. He uses an improvised picture communication system at home, with photos of favorite foods. He knows his alphabet, colors and numbers up to 20. (N.T. 87-88, 101-103, 115, 119-120, 128)
  - b. His attention span is 5-10 minutes on preferred activities, and less than one minute on non-preferred activities. (N.T. 87-88, 101-103, 115, 119-120, 128) While transitions are difficult for Student initially, he gets used to them. (SD 3; N.T. 93, 142)
  - c. His stereotypical autistic behaviors include a whining sound that appears to express displeasure, energetic running around which appears to be self-stimulatory, covering his ears with his hands which may express displeasure and/or serve a self-stimulatory function, and perseverative lining up of objects. (N.T. 88, 89, 93, 109-110, 142)
  - d. Student is cooperative and relatively passive. He does not initiate interaction with siblings or peers. His social interactions are limited to approaching a child who has a toy that Student wants. (N.T. 121, 134) Student repeats, but does not initiate, words that teachers tell him to say in social situations. (N.T. 136)
  
2. During 2003-2004, Student attended an early intervention program called [redacted]. (N.T. 98, 106)

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<sup>1</sup> References to SD, P, and HO are to School District, Parent and Hearing Officer exhibits, respectively. References to N.T. are to the transcript of the February 16, 2006 hearing session.

3. Last school year (2004-2005), Student received early intervention services at an organization [redacted], which provides various wrap-around services, and operates a school designed for children with autism and behavioral problems. (N.T. 98, 106)
4. This school year (2005-2006), Student continues to receive wrap-around services from [the organization], which include a TSS, twice weekly visits in home and in the classroom by a mobile behavior specialist, speech therapy, and occupational therapy (OT.) (N.T. 99-100, 138) Also, as described in more detail in Finding of Fact No. 8, Student is currently unilaterally enrolled in school at [the organization's school].
5. On or about August 29, 2005, the School District issued an evaluation report (ER). Student's inattentive and hyperactive behaviors prevented the evaluator from administering the Test of Nonverbal Intelligence. (SD 3, p.3) The ER recommended that Student receive assistance in improving communication, social interaction, school readiness, and daily living skills. It also recommended a behavior plan to address Student's inattentive, hyperactive, and withdrawn behaviors, as well as to increase Student's compliance time. (SD 3, p.7)
6. On or about August 31, 2005, the School District developed an individualized education program (IEP) with goals in:
  - a. Pragmatic skills in situations with peers in small group settings. (SD 1, p.7)
  - b. Receptive and Expressive language. (SD 1, pp.8-9)
  - c. Sustaining attention. (SD 1, p.10)
  - d. Following one-step directions. (SD 1, p.11)
  - e. Math, and simple reading readiness skill such as identifying letters of the alphabet, matching upper and lower case letters, and identifying letter sounds. (SD 1, pp.12-13)
  - f. Program modifications and specially designed instruction included routine, structure, prompts, sensory regulation when needed, peer pairing, positive praise, use of puzzles, minimal use of play-doh, and dietary restrictions. (SD 1, p.14)
  - g. Related Services included speech and language services twice per week, and screening for physical therapy, occupational therapy, and adapted physical education. (SD 1, p.15)
7. Also on or about August 31, 2005, the School District issued a Notice of Recommended Educational Placement proposing a half-day program in Life Skills instruction and regular education with support. Student's parents did not approve the NOREP because they did not agree to the age range of Students in the proposed placement. (SD 2, p.3)
8. Instead, Student's parents enrolled Student at [the organization's school] for the 2005-2006 school year. (See Finding of Fact 4) Student's class meets from 9 a.m. to 2 p.m. daily. Currently there are 8 autistic children in Student's [school] classroom, with 3 and sometimes 4 adults, one of whom is Student's TSS. (N.T. 107-108, 129-130, 139)

9. The educational placement proposed by the School District is in the School District's only Life Skills classroom for elementary age students. The School District does not have an autistic support classroom. (N.T. 175) Children assigned to the School District's elementary level Life Skills classroom range from kindergarten to sixth grade, ages 6-13. (N.T. 12, 91, 172-173, 202)
- a. The elementary level Life Skills classroom is a large classroom, divided in half by a floor-to-ceiling wall that stretches  $\frac{3}{4}$  the length of the room. This inner wall divides the classroom into two groups. One group consists of kindergarten through 3<sup>rd</sup> grade students (hereinafter called the "Youngers"), and the other group consists of 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> grade students (hereinafter called the "Olders.") (N.T. 11; SD 5) <sup>2</sup>
  - b. The School District's elementary school Life Skills classroom has been configured in this way for 8-9 years. Prior to this school year, Youngers and Olders were separated by room dividers that did not reach the ceiling. In September 2005, the School District constructed the floor-to-ceiling wall. (N.T. 28-29, 68, 72, 82)
  - c. The Life Skills classroom is entered from the school building hallway through a single doorway. Anyone going to the Youngers section must pass through the Olders section first. The bathroom is located in the Olders section. Because it has a regular size toilet, however, the Life Skills teacher prefers to take her Youngers to the smaller-sized bathroom down the hallway in the regular education kindergarten classroom. (N.T. 30, 32)
10. Because every student in the elementary level Life Skills classroom receives speech and language support, a speech and language therapist is in either the Younger or Older section of the Life Skills classroom much of time. (N.T. 36) The Life Skills teacher and the speech and language therapist plan lessons together that incorporate speech and language goals with other goals, such as reading. (N.T. 14-15)
11. The Life Skills teacher is the only certified special education teacher who supervises the elementary age Life Skills classroom. Generally, that teacher is with the Olders in the mornings, and she is with the Youngers in the afternoons. (N.T. 25, 27, 33,44, 94)
- a. She has been a teacher for 13 years, 11 were in the local early intervention program called [redacted]. (N.T. 10, 62) This teacher has experience with a wide range of students, including students with autism. (N.T. 10) She has been with the School District for 2.5 years, and has taught about a dozen children with autism during that time. (N.T. 61)
  - b. The Life Skills teacher has 8 paraprofessionals to assist her, 5 of whom are certified teachers hired to work in paraprofessional positions. When the Life Skills teacher is with the Olders, the paraprofessionals reinforce her teaching instructions to the Youngers. (N.T. 11, 26, 33, 165, 171)

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<sup>2</sup> The terms "Youngers" and "Olders" is mine, not either party's, and are used in this decision solely for purposes of distinguishing the two age-based groups of children in the School District's elementary level Life Skills classroom. I could as easily have used terms such as "Red" and "Blue" or "A" and "B" to make the necessary distinction.

12. At the beginning of the 2005-2006 school year, there were 11 total students in the elementary level Life Skills classroom. (N.T. 11, 33) On the day of the hearing (February 16, 2006), there were 10 total students assigned to that classroom, 5 of whom have been diagnosed with autism. (N.T. 11-12, 53) Of those 10 total students, 4 are in the Youngers group, and 2 of those 4 have been diagnosed with autism. If Student attended the Life Skills classroom, he would be the 5<sup>th</sup> Younger and the 3<sup>rd</sup> autistic Younger. (N.T. 12-13, 23, 27, 55) At least 2 of the current Youngers have attention spans similar to that of Student. (N.T. 55) Three of the current 4 Youngers are kindergarteners, and they spend part of their day in the same regular education kindergarten to which Student would be assigned. (N.T. 55)
13. Because the School District's regular education kindergarten is in the morning, when the Life Skills teacher is with the Olders, that is the time during which Student's inclusion activities with regular education peers would be scheduled. (N.T. 43)
  - a. Student's regular education teacher has 12 years teaching experience with the School District, 4 of which are in this particular regular education inclusion kindergarten. (N.T. 162-163) Before working for the School District, this teacher worked for [another organization] for 3 years. (N.T. 163)
  - b. Currently, she has 13 regular education kindergarten students, as well as 2 learning support kindergarten students and 3 life skills kindergarten students. Student would be her fourth life skills kindergarten student. (N.T. 158) During inclusion times when the additional learning support and life skills kindergarten students are in the regular education classroom, the regular education kindergarten teacher has an additional 4 paraprofessionals. (N.T. 158-159)
  - c. Student's Life Skills and kindergarten teachers confer frequently in order to maintain consistency in their instruction methods. (N.T. 52)
14. The School District proposes that Student's day would begin in the Youngers section of the Life Skills classroom, with one other student and one paraprofessional. Later in the morning, Student would go to the regular education kindergarten classroom for snack time, as well as for story time and/or circle time (P 1; N.T. 18-19, 23, 27, 39, 42, 46-47) In the afternoons, Student would remain in the Life Skills classroom, during which time the Life Skills teacher would be with the Youngers, while paraprofessionals are with the Olders. (N.T. 43-44)
15. Student's parents object to the NOREP because they believe: 1) the dividing wall in the elementary level Life Skills classroom will not adequately separate the Youngers from the Olders; 2) the single teacher and various paraprofessionals will be in and out of the different sections, mainstreaming various children, working on a variety of tasks, and not sufficiently focusing on Student's needs and/or his safety; and 3) Student is entitled to instruction in the mornings by a certified special education teacher, rather than simply reinforcement by paraprofessionals. (N.T. 83-85, 94, 104, 184-185)
16. On November 8, 2005, the School District requested a due process hearing. On November 14, 2005, I was assigned to serve as hearing officer to resolve this dispute. I

granted the School District's request to postpone the December 29, 2005 hearing session to accommodate the schedule of its attorney. Just before the January 25, 2006 rescheduled hearing date, I granted the Student's request for continuance to accommodate the trial schedule of his newly-retained attorney. (HO 2)

17. On February 15, 2006, one day before the February 16, 2006 hearing, the School District received a letter from a special education advisor of the Pennsylvania Department of Education's Bureau of Special Education Division of Compliance, stating that:

“...the classroom size is in compliance with Pennsylvania regulations. Instructional groupings are within age range compliance, in that the groupings do not exceed three years....The size of the divided classroom is in compliance with Pennsylvania regulations. The instructional groupings do not exceed the elementary age range of three years.”

(SD 4; N.T. 65-66)

18. School District exhibits 1-3 and 5, as well as Parent exhibit 1 and HO exhibits 1 and 2, were admitted into the record without objection. Student objects to the admission of SD 4, which is the Department of Education's February 15, 2006 letter approving the age range configuration of the Younger and Older sections of the elementary level Life Skills classroom.
- a. Student contends that this document is hearsay and was not in compliance with the 5 day disclosure rule. I admitted SD 4 into the record over Student's objections. (N.T. 177-179)
  - b. I concluded that the School District disclosed the document as soon as it received it, and therefore the failure to comply with the 5 day disclosure rule was excusable.
  - c. I also concluded at the hearing that the document was not hearsay evidence because it was not offered to prove the truth of the matter asserted, but rather it was simply offered to establish the School District's state of mind in believing that the elementary age Life Skills classroom had been approved by the Department of Education. Upon reflection, I believe that SD 4 is, in fact, hearsay evidence offered to establish the truth of the matter asserted, i.e., that the classroom is in compliance with applicable age range regulations. With that in mind, I cannot base a material finding of fact upon such hearsay evidence.

19. At the February 16, 2006 hearing, I refused to permit Student's attorney to raise, without the concurrence of the School District, any issue relating to the lack of a one-to-one aide, because that issue was not raised in the original request for due process hearing. (N.T 183)

20. This decision is issued:

- a. 120 days from the date of due process hearing request;
- b. 114 days from the date of my assignment as hearing officer;
- c. 20 days from the date of the hearing; and
- d. 13 days from my receipt of the transcript.

### **DISCUSSION**

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. Schaffer v. Weast, \_\_U.S. \_\_, Dkt. No. 04-698 (Nov. 14, 2005) In this case, the School District requested the due process hearing to establish that its proposed program and placement is appropriate. As described below, I find that the School District has met its burden of proof.

Student contends that the School District's proposed program and placement is not appropriate because it places Student into a classroom with an inappropriate age range of students. I will consider this argument with respect to both the regulatory requirements as well as the unique needs of Student (regardless of any regulatory requirements.)

Although federal law does not specify caseload or age range requirements, state regulations do contain such requirements. 22 Pa. Code §14.142 Where student age range is concerned, state regulations provide:

- (f) The maximum age range shall be 3 years in elementary school (grades K-6) and 4 years in secondary school (grades 7-12). A student with a disability may not be placed in a class in which the chronological age from the youngest to the oldest student exceeds these limits unless an exception is determined to be appropriate by the IEP team and is justified in the IEP.

22 Pa. Code §14.142(f). Thus, Student may not be placed in a class in which the chronological age from the youngest to the oldest student exceeds 3 years. State regulations, however, do not define the word "class." They do provide some minimum physical requirements for special education classes in general:

The comparability and availability of facilities for students with a disability shall be consistent with the approved intermediate unit or school district plan, which shall provide, by description of policies and procedures, the following:

- (1) Students with disabilities will be provided appropriate classroom space.
- (2) Moving of a class shall occur only when the result will be:
  - (i) To bring the location for delivery of special education services and programs closer to the students' homes.
  - (ii) To improve the delivery of special education services and programs without reducing the degree to which the

students with disabilities are educated with students without disabilities.

(iii) To respond to an emergency which threatens the students' health or safety.

(iv) To accommodate ongoing building renovations, provided that the movement of students with disabilities due to renovations will be proportional to the number of students without disabilities being moved.

(v) That the location of classes shall be maintained within a school building for at least 3 school years.

(3) Each special education class is:

(i) Maintained as close as appropriate to the ebb and flow of usual school activities.

(ii) Located where noise will not interfere with instruction.

(iii) Located only in space that is designed for purposes of instruction.

(iv) Readily accessible.

(v) Composed of at least 28 square feet per student.

22 Pa. Code §14.144 In this case, there is no argument that either the elementary age Life Skills classroom, or the Youngers area in which Student will be taught, is inconsistent with Section 14.144's physical requirements. The only argument is that the School District's proposed placement exceeds the three year age range requirement of Section 14.142(f).

The School District seeks to rely upon a February 15, 2006 letter from the Department of Education (SD 4) to argue that the State Department of Education has already determined that the School District's proposed placement complies with Section 14.142(f). While I would like to be able to rely upon such an administrative determination, I do not believe that I can do so under the circumstances of this particular case. This letter, which was generated one day before the hearing, is hearsay evidence that was presented without producing any Department witness. While I have no reason to doubt the letter's authenticity, in this case Student had no opportunity at the hearing to cross-examine the Department's finding, nor did he have an opportunity to conduct any reasonable pre-hearing inquiry or even to have informal discussions with Departmental personnel regarding their finding. Considering the genuine surprise and lack of cross-examination associated with this document, I believe that reliance upon the February 15, 2006 letter in this case would deprive Student of fundamental due process.

Accordingly, I will not give the February 15, 2006 Department of Education letter any weight in this particular decision. As I describe below, however, I independently find that the School District's configuration Life Skills classroom, with its Youngers and Olders sections, does not violate state age range requirements.

State regulations require that Student's "class" be comprised of children who are all within a three-year age range. State regulations do not define the word "class" for age-range purposes. The School District suggests that "class" means "instructional groupings." (N.T. 65-68) Student's arguments suggest that a "class" for age-range purposes, either refers to all of



the children who are found within four walls and a door, or all children who are under a single teacher's supervision at any single time. Under either of these definitions suggested by Student, the entire elementary age Life Skills classroom would constitute Student's "class" for age-range purposes, and the School District's proposed placement for Student would violate the state age-range regulation.

I note, however, that Section 14.142(f) does not explicitly refer to the age ranges of children within any particular geographical area, nor do they explicitly refer to the age ranges of the children under any particular teacher's supervision. I believe that the common sense definition of the word "class" in Section 14.142(f) is "subset." Thus, under this common sense definition, when a child with a disability is in a one-room schoolhouse, or on the playground, or in the lunch room, or at a school assembly, or in this School District's elementary age Life Skills classroom, Section 14.142(f) requires that the subset of children with whom that child is placed must all be within a three-year age range.

In this case, the School District's proposed placement does place Student into a "class" or "subset" that meets the age-range requirements of 22 Pa. §14.142(f). The School District proposes placing Student with the Youngers, all of whom are all within a three-year age range. (N.T. 11-12, 23, 27, 33, 53, 55) The Youngers are taught in their own area within the elementary age Life Skills classroom, with a floor to ceiling wall separating them from the Olders. (N.T. 11-12, 28-29, 68, 72, 82, 91, 172-173, 202) Thus, I conclude that the placement proposed by the School District does not violate the age range requirements of the state regulation at 22 Pa. §14.142(f).

I do not believe, however, that my analysis must stop here. Merely because a proposed placement meets regulatory age-range requirements does not automatically mean that it is appropriate for Student. In this case, I respect the suspicions of Student's parents regarding the efficacy of the School District's proposed placement. Clearly, one of the School District's options for meeting state age-range requirements is simply to assign separate special education teachers to supervise the Olders and the Youngers. Its decision to build a  $\frac{3}{4}$  length floor-to-ceiling wall within a classroom in order to comply with age-range restrictions and still maintain its single-teacher configuration clearly is motivated by economics, not pedagogic theory. While this economic motivation reasonably fuels the suspicions of Student's parents, however, it does not necessarily mean that the placement actually is inappropriate for Student.

An appropriate program is one that is provided at no cost to the parents, is individualized to meet Student's educational needs, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. Rowley v. Hendrick Hudson Board of Education, 458 U.S. 176, 102 S. Ct. 3034 (1982) The appropriateness of the IEP is based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993) While school districts are not required to provide the optimal level of services, a program that confers only trivial or minimal benefit is not appropriate. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989) The IEP must be likely to produce progress, not regression or trivial educational advancement. Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986)

Here, I find that the program and placement offered by the School District adequately addresses Student's identified needs and was reasonably calculated to produce meaningful educational benefit at the time it was written. The School District's proposed IEP offers goals and specially designed instruction that addresses Student's needs in math and reading readiness, social skills, pragmatic and expressive/receptive language. (N.T. 13, 87-89, 93, 98, 101-103, 109-110, 115, 119-121, 128, 134, 136, 142; SD 1) those needs. (SD 1) The proposed IEP includes speech and language services and a speech and language teacher is in the Life Skills classroom much of the time. (N.T. 36) The proposed program offers meaningful inclusion opportunities with regular education peers. (N.T. 43) Both Student's special education and regular education teachers have substantial experience in teaching children with autism, and they will be assisted with multiple paraprofessionals. (N.T. 10-11, 14-15, 26, 33, 61-62, 162-165, 171) Finally, the Life Skills teacher, the regular education kindergarten teacher, and the speech and language teacher coordinate regularly with each other. (N.T. 14-15, 52) Accordingly, I conclude that the School District's August 31, 2005 proposed program and placement is appropriate.

### **CONCLUSION**

The School District has proposed an individualized education plan (IEP) for the 2005-2006 school year. Student's parents dispute the appropriateness of that proposed IEP because they believe that it fails to comply with age-range restrictions. For the reasons described above, I find that the School District's proposed IEP does comply with state age-range restrictions. I further find that the proposed IEP is appropriate.

**ORDER**

For the reasons described above, I ORDER that:

- The School District's August 31, 2005 proposed program and placement is appropriate.
- No further action is required of the School District.

*Daniel J. Myers*

Hearing Officer

March 8, 2006

Re: Due Process Hearing  
File Number 6033/05-06 AS