

This is a redacted version of the original decision. Select details 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

DECISION

Child's Name: AO

Date of Birth: XX-XX-XXXX

Date of Hearing: September 18, 2009

CLOSED HEARING

ODR No. 00156-0910LS

Parties to the Hearing:

Parents:
Mr. and Mrs. [redacted]

School District:
Janet McCauslin
Director of Special Education
Central Dauphin School District
600 Rutherford Road
Harrisburg, PA 17109-5227

Representative:

Pro Se

School District Attorney:
Shawn Lochinger, Esq.
Rhoads and Sinon
One South Market Square
P.O. Box 1146
Harrisburg, PA 17108-1146

Date Record Closed:

September 23, 2009

Date of Decision:

September 25, 2009

Hearing Officer:

Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

“Redacted” (Student) ¹ is a 1st grade student in the Central Dauphin School District (District) with spastic paraparesis who contests the District’s determination to replace Student’s one-to-one paraprofessional from last year with a different one-to-one paraprofessional this year. Student’s parents contend that Student’s individualized education program (IEP) and educational needs require last year’s one-to-one paraprofessional. The District prevails in this case because the record does not establish that either Student’s IEP or Student’s educational needs require last year’s one-to-one paraprofessional, and the District has not discriminated against Student in its assignment of its one-to-one paraprofessionals.

ISSUE

Whether Student’s IEP and educational needs require last year’s one-to-one paraprofessional?

FINDINGS OF FACT

1. Student, whose birthdate is [redacted], is a resident of the District with spastic paraparesis, which affects Student’s muscle tone and daily energy levels. (NT 19; S3) ² Student receives weekly speech and language therapy, weekly occupational

¹ All future references to Alex will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

² References to “HO,” “P,” and “S” are to the Hearing Officer, Parent, and District exhibits, respectively. References to “N.T.” are to the transcripts of the hearing conducted in this matter.

therapy, and program modifications to facilitate Student's processing of verbal information. (P1; NT 20, 31, 39) Student's physical needs require a one-to-one paraprofessional for lunch and bookbag activities, toileting and personal hygiene tasks, as well as gross and fine motor assistance while interacting with peers on the playground. (NY20; P3,p.1)

2. Last year, when Student attended ½ day kindergarten, Student's one-to-one paraprofessional was Ms. K. The parties stipulate that Ms. K's performance was excellent. (NT 12; P6) Ms. K understood Student's needs very well. (NT 49) It took several months for the relationship between Ms. K and Student to develop. (NT 72)
3. On March 10, 2009, Student's IEP team developed a plan for the remainder of Student's kindergarten (2008-2009), as well as Student's 1st grade (2009-2010), school years. (P1; S2)
 - a. One of the accommodations on the IEP was that Student's one-to-one paraprofessional could determine when Student was too fatigued for testing and assignments. (P1, p.13) The IEP team developed this accommodation because Ms. K understood Student's needs so well. (NT 49, 57)
 - b. When the IEP was developed, it was unclear whether Ms. K would serve as Student's 1st grade one-to-one paraprofessional. (NT 18-19, 67-68; SD2, p.6)
 - c. The IEP does not state that Ms. K will be Student's one-to-one paraprofessional. (NT 49, 66)

- d. The one-to-one paraprofessional is not listed in the IEP under the related services section. (NT 63; S2, pp. 13-14)
 - e. Because she was not being paid to attend the IEP team meeting, Ms. K was permitted to leave the IEP team meeting before it was over. (NT 30, 69)
- 4. Over the summer, the District conducted its annual personnel needs review. (NT 75) Because Student was expected to transition out of ½ day kindergarten and into full-day 1st grade, the District no longer needed a part-time one-to-one paraprofessional and, therefore, eliminated that part-time position. (NT 75) Because Student was expected to transition into full-day 1st grade, the District needed a full-time one-to-one paraprofessional and, therefore, created a new full-time position. (NT 75)
- 5. At the end of its annual personnel needs review, the District eliminated five part-time positions and nine full-time positions. (NT 76) For each eliminated position, the employee in that position was furloughed and given first rights to apply for a comparable (½ day or full-day) new position. (NT 76)
- 6. Ms. K was employed last school year as a part-time employee in a part-time position. (NT 74) Mr. M was employed last school year as a full-time employee in a full-time position. (NT 77) Both Ms. K and Mr. M were furloughed when their respective ½ day and full-day positions were eliminated. (NT 77, 81; P4, pp.6-7)
- 7. At the end of June 2009, Student's physical therapist (PT), occupational therapist (OT), former kindergarten teacher, and pediatrician praised Ms. K's past

- performance and recommended that Ms. K's extensive knowledge of Student's needs would be of great help in the beginning of Student's 1st grade year. (P2, pp.2-3; P3)
8. Mr. M exercised his right to apply for one of the newly created full-day positions. More specifically, Mr. M applied for the newly created full-day position as Student's one-to-one paraprofessional. (NT 77, 81, 84)
 9. As a part-time employee, Ms. K was entitled to apply for any newly created full-day position only after all furloughed full-time employees had exercised their application rights. (NT 84, 88) Either by choice or because no full-day vacancies were available, Ms. K took a vacant position for the 2009-2010 school year as a non-instructional cafeteria and recess aide. (NT 84-85)
 10. Mr. M meets the minimum qualifications required to be Student's one-to-one paraprofessional. (NT 83, 91, 97-99)
 11. Student is not accustomed to being in the presence of many men. (NT 22) In the past, when Student has experienced personnel changes in home health care providers, Student has regressed in both behavior and motor skills. (P3,p.2)
 12. This school year, Student has experienced transitions to full-day 1st grade, with the accompanying new teacher, and a difference in classmates and academic schedule. (NT 21, 51) It is very common for District students to have different teachers and different class members each school year. (NT 71)
 13. On August 10, 2009, Student's parents filed a due process hearing complaint alleging that the District inappropriately placed its own administrative interests

ahead of Student's needs. The relief sought was to retain/reinstate Ms. K as Student's one-to-one paraprofessional.

14. Since the beginning of the 2009-2010 school year,

- a. Mr. M performed Student's coloring activity rather than giving Student extended time within which to finish the coloring project later. (NT 31, 39) Because Student's IEP provides that the one-to-one paraprofessional will scribe for Student when necessary, Mr. M provided the coloring assistance at Student's request because Student was tired. (NT 102, 104)
- b. Mr. M permitted the District to administer a DIBELS reading assessment just after Student had received very fatiguing OT and PT; Parents believe Ms. K would not have permitted such testing because Ms. K would have recognized that Student was fatigued. (NT 39-41)
- c. Student had a [Redacted] accident recently while engrossed in an Everyday Math computer game, which never occurred when Ms. K was Student's one-to-one paraprofessional. (NT 41, 105-106)
- d. Student has been more clingy and needy towards Student's father recently. (NT 42)
- e. Student has been more aggressive toward female home aides recently. (NT 42) They are having difficulty taking Student to the bathroom because Student wants to be accompanied by a man. (NT 23)
- f. Student has been sad, moodier, and withdrawn recently. (NT 42-43, 45)

g. Mr. M asked Parent, in front of Student, whether Ms. M ever used a sippy cup to assist Student in drinking, which question caused Student to feel different and defeated. (NT 46)

15. Mr. M has only been working with Student for three weeks and believes that his relationship with Student will develop with time. (NT 103-104)

16. A due process hearing was conducted on September 18, 2009. HO 1, P1-P10, and S1-S6 were admitted into the record. (NT 111) Each party behaved professionally and listened respectfully to the other party's position – it is clear that Parents and Teachers in this case are caring, competent people. I sustained the District's objections to Parental arguments that that Student's speech needs have regressed since starting the new school year (NT 24) and that the OT should have been, but was not, at March 10, 2009 IEP meeting. (NT 33-34) These were not issues raised in the August 10, 2009 complaint. (NT 26, 35)

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) If one party produces more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence. In this case, the Parents bear the burden of proof because they contest the District's assignment of Mr. M

to be Student's one-to-one paraprofessional, and they seek to have Ms. K retained/reinstated to that position.

The record does not establish that either Student's IEP or Student's educational needs require last year's one-to-one paraprofessional

A free appropriate public education (FAPE) does not require that Student's IEP maximize Student's potential or provide the maximum possible benefit. The IEP simply must be reasonably calculated to enable Student to achieve meaningful educational benefit. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533-534 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996) When the evidence supports a finding that the District's proposed program is reasonably calculated to allow Student to make meaningful effective progress, then administrative assignments of qualified personnel to provide the specific service is left to the discretion of the District. Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982)

Nothing in Student's IEP explicitly requires Ms. K to be Student's one-to-one paraprofessional. Parents argue that Student's March 10, 2009 IEP team an accommodation specifically with Ms. K in mind. (NT 49, 57) That accommodation provides that the one-to-one paraprofessional could determine when Student was too fatigued for testing and assignments. (P1, p.13) This is not the same as requiring a particular person to serve as the one-to-one paraprofessional. Rather, it is an IEP expectation of future one-to-one paraprofessionals, based upon Student's actual experiences with Ms. K.

Parents also argue that the IEP is procedurally flawed because The one-to-one paraprofessional is not listed in the IEP under the related services section. (NT 63; S2, pp. 13-14) In matters alleging a procedural violation, however, a hearing officer may find

that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate, or caused a deprivation of educational benefit. 34 CFR §300.513(a)(2) The evidence does not establish that either Student's right to FAPE or Parents' right to participate were impeded, nor is there evidence that educational benefit has been deprived as a result of where the one-to-one paraprofessional was placed in the IEP.

Parents alternatively argue that, even if the IEP does not require Ms. K explicitly, Ms. K's assignment is required by Student's needs for consistency and familiarity, as well as to avoid the harm that will occur during the time necessary for Student and Mr. M develop a relationship. The evidence in the record, however, does not support this argument.

In the past, when Student has experienced personnel changes in home health care providers, Student has regressed in both behavior and motor skills. (P3,p.2) Student is not accustomed to being in the presence of many men. (NT 22) Student has been more aggressive toward female home aides recently. (NT 42) They are having difficulty taking Student to the bathroom because Student wants to be accompanied by a man. (NT 23) The School District is not responsible, however, for Student's home program.

Student has experienced a number of transitions this school year besides the change in one-to-one paraprofessionals. (NT 21, 51) These transitions are very common for all District students. (NT 71) The only possible evidence of any regression at school concerns one [Redacted] accident. (NT 41, 105-106) This is insufficient evidence, however, to establish either regression in [redacted] or a link between the alleged regression and Mr. M's assignment.

Regarding the time that it will take for Mr. M to develop a relationship with Student, Student's PT, OT), former kindergarten teacher, and pediatrician recommended that Ms. K's extensive knowledge of Student's needs would be of great help in the beginning of Student's 1st grade year. (P2, pp.2-3; P3) It took several months for the relationship between Ms. K and Student to develop. (NT 72) Mr. M has only been working with Student for three weeks and believes that his relationship with Student will develop with time. (NT 103-104) No one can predict whether Mr. M's relationship with Student at the end of the year will be worse, the same as, or perhaps even better, than Ms. K's relationship with Student was at the end of last year. It will take time to develop, however, just as it did with Ms. K. While it would be convenient for Student not to have to wait for such relationship development, nothing in the record establishes that Student's educational needs will not be met during that development time.

Thus, Student's IEP does not explicitly require Ms. K to be Student's one-to-one paraprofessional. Further, the record does not establish that Ms. K's assignment is required by Student's needs for consistency and familiarity. Finally, the record does not establish that Student's educational needs will not be met during the time necessary for Student and Mr. M develop a relationship.

The District has not discriminated against Student in its assignment of its one-to-one paraprofessionals

34 CFR §300.156(b) addresses the qualifications of related service providers, and requires in pertinent part that related service personnel must have qualifications consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services. The District is

responsible to employ certificated personnel and provide adequate supervision to assure that an appropriate program is delivered. MS v Central Dauphin School District, Special Education Opinion No. 1058 (2000); MK v Carbon-Lehigh IU, Special Education Opinion No. 942 (1999)

Parents allege that the District improperly followed its own personnel rules by allowing Mr. M to exercise a right of claim for an eliminated position, and by failing to comply with its own job descriptions for paraprofessionals. From the credible testimony of the District's Director of Human Resources for Classified Staff, however, it is clear that the District did not discriminate against Student and rationally followed its personnel procedures.

When the March 10, 2009 IEP was developed, it was unclear whether Ms. K would serve as Student's 1st grade one-to-one paraprofessional. (NT 18-19, 67-68; SD2, p.6) After the District's annual personnel needs review, five part-time positions and nine full-time positions were eliminated, including Mr. M's full-time position as well as Ms. K's part-time position. (NT 75-76) Both Ms. K and Mr. M were furloughed when their respective ½ day and full-day positions were eliminated. (NT 77, 81; P4, pp.6-7) As a part-time employee, Ms. K was not entitled to apply for the newly created full-day position as Student's one-to-one paraprofessional until after all furloughed full-time employees had exercised their application rights. (NT 84, 88) Mr. M exercised his right to apply for one of the newly created full-day position as Student's one-to-one paraprofessional. (NT 77, 81, 84) Either by choice or because no full-day vacancies were available, Ms. K took a vacant position for the 2009-2010 school year as a non-

instructional cafeteria and recess aide. (NT 84-85) These results are consistent with the District's personnel procedures and do not establish any discrimination.

In addition, Mr. M meets the minimum qualifications required to be Student's one-to-one paraprofessional. (NT 83, 91, 97-99) This meets the District's responsibility to employ certificated personnel to implement an appropriate program. Thus, Mr. M's appointment as Student's one-to-one paraprofessional does not violate any personnel selection or qualification requirements.

CONCLUSION

Neither Student's IEP nor Student's educational needs require last year's one-to-one paraprofessional. Further, the District has not discriminated against Student in its assignment of Mr. M to be Student's one-to-one paraprofessional.

ORDER

- The District's appointment of Mr. M to be Student's one-to-one paraprofessional is appropriate.
- No action is required of the District.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

September 25, 2009

Alexander Orner
Central Dauphin School District
ODR No. 00156-0910LS