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Pennsylvania

Special Education Hearing Officer

DECISION

DUE PROCESS HEARING

Name of Child: BB  
ODR #00207/09-10 AS

Date of Birth:  
XX-XX-XXXX

Date of Hearing:  
November 9, 2009

OPEN HEARING

Parties to the Hearing:  
Ms.

Representative:  
Pro Se

Cheltenham School District  
1000 Ashbourne Road  
Elkins Park, Pennsylvania 19027

Claudia Huot, Esquire  
Wisler Pearlstine  
484 Norristown Road, Suite 100  
Blue Bell, Pennsylvania 19422

Date Record Closed:  
Date Transcript Received:

November 16, 2009  
November 16, 2009

Date of Decision:

November 27, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.  
Certified Hearing Official

## Background

Student<sup>1</sup> is an eligible student with a classification of emotional disturbance who was formerly enrolled in the Cheltenham School District (hereinafter District). The Student's mother (hereinafter Parent) requested this hearing to address her concerns that Student had been denied a free appropriate public education due to non-implementation of Student's IEP.

The Parent withdrew the Student from the District in May of the 2008-2009 school year pursuant to an incident that is being addressed through a complaint through other channels. Although the Parent sought to have the subject matter of that complaint addressed in this hearing, the hearing officer ruled that that matter was not within her jurisdiction and that claims would be limited to those properly under the authority of a special education hearing officer. [HO-1]

Subsequent to removing the Student from the District, the Parent enrolled Student in a private school<sup>2</sup> for the 2009-2010 school year. However, currently being dissatisfied with the appropriateness of that school for the Student, the Parent seeks to enroll the Student in a cyber charter school. As enrollment in the cyber charter school would necessitate her being at home with the Student, the Parent is requesting that the District pay her a salary while she stays at home with the Student while the Student is being served by the cyber charter school.

Once the hearing had begun the parties were permitted a brief adjournment to hold a Resolution Meeting which did not result in an agreement. [NT 25-27]

## Issues

Did the District deny the Student a free appropriate public education by failing to implement the Student's IEP for school year 2008-2009?

If the District denied the Student a free appropriate public education, is the District required to pay the Parent a salary while she remains at home while the Student is enrolled in a cyber charter school?

## Findings of Fact

1. The Parent was in agreement with and approved by signed NOREP the program and placement for student for the 2008-2009 school year. [NT 47; S-4]

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<sup>1</sup> The decision is written without further reference to the Student's name or gender to provide privacy even though this was an Open Hearing.

<sup>2</sup> The Parent did not request tuition reimbursement for the private school. [NT 25]

2. Under the 2008-2009 IEP the District was to provide weekly behavior charts to the Parent. [NT 33, 36; S-3, S-6]
3. The Parent did not receive all the behavior charts that were to be provided. [NT 39]
4. The emotional support classroom implements a contingency system with weekly rewards for behavior and academics. Data is taken on goals, and information was communicated verbally between the special education teacher and the mother numerous times. [NT 77-80]
5. Regular education teachers provided weekly behavior charts and the teacher communicated information regularly to the Parent. The special education teacher did not keep copies of all the charts beyond the end of the block period. [NT 80-83; S-6]
6. The charts in S-6<sup>3</sup> are a sampling of those the Student received during the 2008-2009 school year. [NT 82-83]
7. Under the 2008-2009 IEP the District was to provide trimester progress reports to the Parent. [NT 40]
8. The Parent did not receive trimester progress reports for the first and third trimesters of 2008-2009. The Student stopped attending school before the end of the third trimester. [NT 40-41; S-5]
9. The Parent and the Emotional Support teacher talked “constantly” on the phone according to the mother, and if needed the teacher would put the Student on the phone to talk to the mother. The emotional support teacher estimated that they talked three or four times a week, sometimes more and sometimes less, about good behavior as well as bad behavior. The mother and the teacher had a good relationship. [NT 44-45, 94]
10. Under the 2008-2009 IEP the Student was to receive individual and small group counseling weekly. The Parent does not know whether or not the counseling was provided. [NT 41, 55-57; S-3]
11. If the Parent had suspected that the Student was not receiving the counseling she would have asked. [NT 57-58]
12. The Student did attend counseling “faithfully” twice a week weekly. At times the school-wide Community Building class was the third contact the Student and the counselor had in a week. At other times if the Student and the counselor were not

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<sup>3</sup> Some of the teachers’ names on the charts are incorrect due to errors made by a new assistant teacher. [NT 85-87]

- mutually available the Community Building session served as one of the two sessions. [NT 91, 114-117]
13. Topics addressed in counseling were appropriate for the Student's needs. [NT 115-116, 118-119]
  14. The special education teacher also addressed social skills such as appropriate emotional expression with the students in the class. [NT 92-93]
  15. On a Parent Input form for the upcoming IEP completed by the Parent on 3-27-09 the mother noted that she was happy that the Student was in the emotional support class, but believed that Student needed more help with speech and life skills such as time and money. [NT 43, 95-96]
  16. The Parent believes that prior to just before Student stopped attending school in the District Student was doing well there. [NT 45]
  17. The emotional support teacher noted progress during the 2008-2009 school year. [NT 98-99]
  18. The District held an IEP meeting, which the mother attended, in June 2009 to address the coming school year. The emotional support teacher was not present due to illness. The emotional support teacher had set up an earlier meeting in June but the Parent did not attend. [NT 47, 98, 106-107; S-9]
  19. The Parent did not raise specific concerns about anything in the IEP at the meeting, and did not ask for a follow-up meeting. [NT 50-51; 65-66]
  20. As the Student had stopped attending school, the District offered in-home tutoring at the time of the IEP meeting, to continue past the end of the school year, but the Parent declined because she did not want the tutors in her home invading her privacy. [NT 66-68]

### Discussion and Conclusions of Law

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of

the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In the instant matter, the evidence was not in equipoise.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.<sup>4</sup> Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003). This is a particularly important function, as in many cases the hearing officer level is the forum in which the witnesses will be appearing in person.

Special Education Foundations: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

'Special education' is defined as specially designed instruction...to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

FAPE is defined as "special education and related services" provided according to the IEP. 20 U.S.C. §1401(9); 34 C.F.R. §300.17

Having been found eligible for special education, the Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP). A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)).

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<sup>4</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Districts need not provide the optimal level of service, maximize a child's opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4<sup>th</sup> Cir. 1998); Lachman, supra. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). More recently, the Eastern District Court of Pennsylvania ruled, "districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at \*7 (E.D.Pa., July 24, 2008), citing Carlisle, 62 F.3d at 534, citations omitted. . See also, Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008).

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

### Discussion

The Parent has asserted that certain aspects of the 2008-2009 IEP were not implemented, namely that she did not receive weekly behavior charts, that she did not receive trimester reports, and that she was uncertain as to whether or not the Student received counseling. [FF 2, 7, 10] The Student is no longer enrolled in the District, having been removed and placed in a private school for the first several months of the current [2009-2010] school year. That placement not having been successful, the Parent requests that she be paid to stay home with the Student while the Student participates in a cyber charter school program.

The Parent sought to have this hearing, filed at the end of August 2009, largely to address a matter that she had already referred to the U.S. Department of Education Office for Civil Rights [OCR] and the Pennsylvania Department of Education Bureau of Special Education in July 2009. The hearing officer received from the District a Motion to Dismiss the Complaint or in the alternative a Motion in Limine to Exclude Evidence. [HO-1] The hearing officer ruled that the portion of the complaint sent to OCR and PDE/BSE was not within the jurisdiction of a special education hearing officer. OCR is investigating the matter. As is its custom, PDE/BSE indicated that it would not be investigating the matter as a due process hearing had been filed. This decision then addresses only the portion of the Parent's complaint that has to do with the provision of FAPE to the Student.

The Parent is clearly a concerned and involved mother who until the end of the last school year was pleased with the Student's program and had an excellent relationship

with the emotional support teacher. [FF 9, 15, 16] During this hearing she challenged the implementation of three aspects of the IEP.

Although the Parent claims not to have received weekly behavior charts, the emotional support teacher testified credibly that these were collected and the information transmitted to the Parent. [FF 5] Even if the Parent did not receive each and every weekly chart, she and the teacher spoke numerous times weekly, freely exchanging information. [FF 4, 9]

The Parent asserted that she did not receive trimester reports. The emotional support teacher testified that she did prepare trimester reports and attached them to the report cards, but the District could not produce them. A factual finding was not reached on this point, as there is no clear basis for doing so. However, in the unlikely event that trimester reports were not supplied the Student was not denied educational opportunity on this basis as information flowed freely between the Parent and the teacher several times a week. [FF 9]

Although the Parent questioned whether the Student received counseling she did not provide any proof to the contrary. Both the emotional support teacher and the counselor testified credibly that the counseling portion of the IEP was fulfilled. [FF 12, 13]

The Parent has not met her burden of proof on any issue. Since none of the issues addressed in the hearing were proven, there is no basis upon which to examine whether the Student was denied FAPE. Therefore, there is no need to reach a conclusion on the question of whether or not the remedy sought by the Parent would have been one to which the Student would have been entitled had FAPE been denied.

#### Order

It is hereby ordered that:

The District did not deny the Student a free appropriate public education and is not required to take any further action regarding the issue addressed in this hearing.

November 27, 2009  
Date

*Linda M. Valentini, Psy.D.*  
Linda M. Valentini, Psy.D.  
PA Special Education Hearing Officer  
NAHO Certified Hearing Official