

*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

ODR No. 00817-0910AS

Child's Name: DP

Date of Birth: xx/xx/xxxx

Date of Hearing: 4/14/10

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent

Parent Attorney

Pro Se

School District

School District Attorney

North Penn  
401 E. Hancock St.  
Lansdale, PA 19446-3960

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Date Record Closed:

April 23, 2010

Date of Decision:

April 28, 2010

Hearing Officer:

Anne L. Carroll, Esq.

**INTRODUCTION AND PROCEDURAL HISTORY**

Student is a 9 year old Student eligible for special education services under the OHI (Other Health Impairment) disability category. Student is currently enrolled in a full time learning support class in a North Penn School District (hereinafter District) elementary school, but not at the school Student would attend if not disabled.

During the current school year, Student has intermittently and unpredictably exhibited extreme behaviors that cannot be successfully controlled with positive behavior support strategies. Although acknowledging that the behaviors are a manifestation of Student's disability for which a disciplinary change of placement is not warranted, the District recommends a 45 day interim placement in an alternative school in order to conduct a comprehensive evaluation and develop better behavior management strategies in a setting where Student's extreme behaviors will not pose a danger to himself or to other students.

Parent agrees that the current public school setting is inappropriate for Student, but disagrees that Student's behavior outbursts are dangerous and disagrees with the proposed interim alternative placement. Parent prefers to keep Student in the current classroom until the District finds a school of which she approves.

After a brief due process hearing session on April 14, 2010, both parties submitted written closing statements. For the reasons that follow, the District will be permitted to enroll Student in its proposed alternative placement for 45 days, and will be directed to conduct a comprehensive evaluation during that period, while continuing to work with Parent to identify a mutually agreeable placement for the next full school year.

## ISSUE

Should the North Penn School District be permitted to enroll Student in the [Redacted school] School for a 45 day interim placement for the primary purpose of conducting a comprehensive evaluation and for the development and trial of additional/different behavior management strategies?

## FINDINGS OF FACT

1. Student(Student) is a 9 year old child, born [Redacted]. He is a resident of the North Penn School District and is eligible for special education services. (Stipulation, N.T. p. 19).
2. Student has a current diagnosis of Other Health Impairment (OHI) in accordance with Federal and State Standards, due primarily to a diagnosis of attention deficit/hyperactivity disorder. (ADHD) 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii); (N.T. pp. 20 (Stipulation), 92)
3. Student has also been diagnosed with a communication disorder and a sensory disorder. (N.T. pp. 106, 107, 115, 178)
4. For the 2009/2010 school year, Student is attending a full-time learning support class in a District elementary school that is not his home or neighborhood school. (Stipulation, N.T. pp. 20—22)
5. A functional behavioral assessment (FBA) was conducted in May 2009, and he entered the current school year with a behavior plan developed from that FBA. Student's current special education teacher reviewed the FBA prior to taking over Student's instruction. (N.T. pp. 34—36, 38, 143; S-1, P-3)
6. Although incidents of verbal and physical aggression were documented in the May 2009 FBA, Student's special education teacher believed that Student could be successfully maintained in the full-time learning support class with both a class-wide behavior management plan and an individualized behavior support plan in place. (N.T. pp. 37, 38; S-1)
7. From the beginning of the current school year and continuing to the present, Student's classroom behaviors on most days are manageable with re-direction and other strategies in his behavior plan and the class behavior management plan. (N.T. pp. 48, 97, 145)
8. When Student began exhibiting an increase in aggressive and violent behaviors toward the end of September 2009, the District arranged for observations of Student by a Montgomery County Intermediate Unit (MCIU) behavior analyst in late September and late October 2009. The MCIU behavior analyst provided written recommendations to the teacher in November 2009. (N.T. pp. 39, 123, 143, 144, 146; S-2)

9. On two occasions, once in late September and the other in late October 2009, Student needed to be removed from the classroom to end incidents of uncontrolled aggressive behaviors, and also needed to be restrained on one occasion during that period. (N.T. pp. 66, 145, 146; S-6, p. 2)
10. After the behavior analyst's first observation on September 30, 2009 Student's special education teacher implemented a new reinforcement strategy of rewarding Student with a sticker for appropriate behaviors in 15 minute intervals, which initially appeared to work well. (N.T. pp. 43—45, 99, 100; S-2)
11. At the behavior analyst's recommendation, an "A-B-C" (antecedent-behavior-consequence) record was initiated in December 2009 to take specific data on Student's violent and aggressive behaviors that significantly exceeded, in both nature and duration, the types of inappropriate behaviors that Student generally exhibits, which can be brought under control within a reasonable time by the usual behavior support strategies. (N.T. pp. 41, 112, 147; S-3)
12. The extreme behaviors that concern the District and the MCIU behavior analyst include [Redacted behaviors]. (N.T. pp. 51—85, 87, 126, 128, 129, 131, 138, 139; S-3)
13. Between December 3, 2009 and April 6, 2010, 28 incidents of extreme behaviors were recorded, of which 6 required Student's removal from the classroom to calm down, 2 required restraining Student to avoid injury to himself, and 1 required that the other Students be removed from the classroom for their safety. (N.T. pp. 41, 51—78, 126—129, 136; S-3; S-6)
14. Several additional serious behavioral incidents occurred in April 2010, including 3 on April 14, the day of the hearing, one of which required that the other students be removed from the classroom for their safety. The other students were also removed during a behavior incident on April 12. (N.T. pp. 41, 78—85, 127)
15. The MCIU behavior analyst is concerned that Student's extreme behaviors are increasing in frequency, intensity and duration. (N.T. p. 149)
16. The District staff, including members of Student's IEP team, and the MCIU behavior analyst, all believe that a comprehensive evaluation is needed to determine the full extent of Student's behavioral needs and the source of the violent and aggressive behaviors. The District IEP team members also believe that Student may need a permanent placement in a setting with a trained behavior management specialist available on a daily basis in order to avoid injury to himself and classmates. (N.T. pp. 87, 88, 127, 129, 130, 136—138, 148, 160, 161)
17. The District is unable to meet Student's behavior needs in the learning support classroom with the behavioral strategies and supports currently in place, and cannot provide sufficient supports and services in that classroom or in any other District setting. (N.T. pp. 37, 87, 131, 159, 161, 162, 168; S-6)

18. At an IEP meeting on March 10, 2010, at which Student's IEP goals were also updated and revised, the District proposed a 45 day interim placement in a full-time emotional support classroom at an approved private school, [Redacted School], for an evaluation and for development of more effective management strategies. (N.T. pp. 34—37, 88, 159, 160, 164; S-5, S-6)
19. The District and the MCIU behavior analyst consider the alternative placement the best location for the evaluation and for developing recommendations to bring Student's extreme behavior outbursts under control before an injury occurs. (N.T. pp. 88, 149, 151, 156, 163, 164, 168)
20. Parent visited the proposed school with District staff, including the special education supervisor, on March 13, 2010. The visit occurred on the Saturday following the mid-week IEP meeting because that was Parent's first available opportunity to visit the school, and the District hoped to have Student begin there very quickly. (N.T. pp. 156, 169, 174 )
21. At the end of the visit, the District staff believed Parent had agreed to the proposed interim placement, and Parent herself thought that the 45 day placement might be worthwhile. After discussing the matter with friends and family members, however, Parent rejected the NOREP on March 15. (N.T. pp. 174—176, 189, 190; S-6, p. 2)
22. Parent acknowledges that the extreme behaviors described by District witnesses are disruptive but does not consider the behaviors dangerous because neither Student nor any one else has been injured. (N.T. p. 182, 185, 187)
23. Although Parent agrees that the current placement is not meeting Student's behavior needs, she also believes that the extreme behaviors are a reaction to situational stressors in Student's life, including an impending divorce, her return to full-time work, and in at least one instance, Student's illness. (N.T. pp. 114, 182, 188, 192)
24. Student wears a patch for gradual release of medication for his ADHD. Parent believes that at least some of the violent and aggressive behavioral incidents occurred when the medication patch fell off or Student removed it. (N.T. pp. 113, 114, 116—119)
25. Parent also questions whether there are sufficient behavior supports in place for Student and whether Student's behavior plan has been appropriately and consistently implemented during the current school year. (N.T. pp. 109, 182, 192, 193; P-3)
26. Parent's primary concern with the proposed alternative school is that Student will be exposed to a violent school environment that is lacking in positive peer behavior models. Parent also noted that most students in the alternative school qualify for the free lunch program, but Student could not eat many of the food on the menu due to food allergies and sensitivities. (N.T. pp. 156, 190—192)

27. At Parent's request, the District has explored several private school placements, but as of the date of the hearing, none had offered an immediate placement. (N.T. pp. 166, 167 171, 172, 189; S-6)
28. The MCIU behavior analyst has had numerous opportunities to observe and interact with the staff at the [Redacted School] with respect to students who are placed there temporarily from MCIU-sponsored classrooms, or who are expected to enter MCIU classrooms. She has found the evaluations conducted at [Redacted School] accurate and helpful, and the classes appropriate for students with many types of disabilities. (N.T. pp. 151, 152, 154)
29. With a staff to student ratio of approximately 4 to 10, the MCIU behavior analyst also finds the classrooms at [Redacted School] highly structured, calm and well-controlled, with numerous supports available to address students' behavioral and emotional needs, including effective behavior management strategies. Academic instruction is provided in small groups and individually in accordance with each student's IEP. (N.T. pp. 151—154, 165)
30. The MCIU behavior analyst has had experience with many students who successfully transitioned back to their regular classrooms after an interim, evaluative placement at [Redacted School].. Students return with recommendations for new behavior strategies and the staff at the returning students' schools have opportunities for consultation with the [Redacted school]staff. (N.T. p. 154)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Legal Authority for 45 Day Change of Placement to an Interim Alternative Setting

Since the District initiated the due process complaint in this matter, the District had both the obligation to establish the appropriateness of the relief it sought (burden of persuasion) and the obligation to go forward with the evidence (burden of production). *See Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005).

Although the District submitted the due process complaint and request for an expedited hearing under 20 U.S.C. §1415(k), the section of the IDEA procedural safeguards provisions generally applicable to disciplinary matters, the District acknowledged that its request to assign Student to a 45 day interim alternative educational setting was not made for disciplinary purposes, but because the District believes that maintaining the current placement is substantially

likely to result in injury to Student or others. 20 U.S.C. §1415(k)(3)(A). The District further acknowledges that all of Student's behaviors, described in detail during the hearing, are manifestations of Student's disability. Consequently, no manifestation determination was necessary to fulfill the requirements of 20 U.S.C. §1415(k)(1)(E).

It is obvious that although the District did not seek a change of placement for disciplinary reasons, the behaviors in this case do involve violations of the code of student conduct. *See* F.F. 12. Consequently, it was appropriate for the District to invoke the expedited hearing provisions when Parent rejected the District's proposal for a 45 day interim change of placement. F.F.18, 21

Moreover, even if the discipline provisions did not apply in this case, the District could still have sought a due process hearing to obtain an order for a change of placement in accordance with 34 C.F.R. §300.507(a), albeit not on an expedited basis.

#### Factual Basis for School District's Interim Change of Placement Proposal

There is no dispute in this case that the District has a legitimate basis for proposing to reassign Student to an approved private school specializing in students with behavior and emotional support needs. Four witnesses testified in detail on behalf of the District concerning the violence and aggression that characterize the incidents of Student's out of control behaviors. F.F. 9, 12—14 In addition, the District produced a log describing the most extreme behaviors from December 2009 through the date disclosures were due that fully supported the testimony of the District witnesses. *See*; S-3 Based upon descriptions of the behaviors, the need to remove Student from the classroom on several occasions, the need to remove the other students from the classroom at other times, and the occasions on which Student was restrained, the District argued

that the episodes of violent and aggressive behaviors constitute a danger to Student, staff and/or peers.

Parent acknowledges that Student intermittently exhibits the classroom behaviors described by the District witnesses, and that such behaviors are disruptive. *See* F.F. 22 Parent does not, however, agree that Student's behaviors are dangerous and believes that the extreme behaviors can be largely prevented and effectively handled in the classroom by consistent and appropriate implementation of Student's behavior support plan. Parent also testified to external stresses to which Student has been subjected, particularly since January 2010, and argued that the incidences of extreme behaviors were likely related to those circumstances, as well as to occasional illness and loss or removal of the patch that delivers Student's ADHD medication. F.F. 23, 24

Even if Parent is entirely correct that the underlying circumstances she identified are the root of the extreme behaviors, that does not diminish the need for a more effective behavior plan to get those behaviors under control. Student will always be subject to unforeseeable situations that may cause stress, but Student cannot be permitted to continue to react to such circumstances with violent and aggressive behaviors in the classroom. Moreover, Parent cannot accurately assess whether the extreme behaviors are dangerous to Student, staff and/or peers, since she was never present in the classroom when such behaviors occurred. The evidence from the district witnesses and the supporting documentation establishes that the behaviors at issue are far more than simply disruptive.

Although the behaviors of concern do not occur on a daily basis, and the frequency appears to wax and wane, the behaviors are violent, aggressive, unpredictable and appear to be escalating. F.F. 7, 9, 12, 13, 14, 15 In addition, the evidence established that despite the



District's efforts to effectively address the behaviors, including consulting with an MCIU behavior analyst, the District has been unable to develop and implement a behavior plan that is successful in predicting or controlling the violent and aggressive behaviors. F.F. 8, 9, 13, 14 Student's behavior plan and the positive reinforcement schedule recommended by the MCIU behavior analyst in September 2009 are, however, otherwise effective in addressing Student's ordinary off-task behaviors. F.F. 7, 10

Student entered the current full-time learning support classroom with an FBA that identified gaining adult attention, avoidance of demands and sensory stimulation as the functions of Student's challenging behaviors. (S-1, p. 7) The FBA also identified antecedents to the behaviors, such as lack of adult attention, transitions from preferred to non-preferred activities and demands to perform academic tasks. (S-1, p. 7) The antecedents necessarily occur daily in the classroom, but fortunately do not regularly trigger the extreme, out of control behaviors. F.F. 7 Unfortunately, the extreme behaviors cannot be predicted, sometimes have no readily identifiable antecedent, and the behaviors vary in intensity and duration, making it difficult to be either proactive or to react effectively.

Even more unfortunately, from the testimony at the hearing, it appears that the combination of the unpredictable occurrences of the extreme behaviors, as well as their unpredictable duration and intensity, ultimately lead to consequences that have the undesirable effect of reinforcing the worst and longest-lasting behaviors. The more violent and uncontrollable Student's behaviors are, and the longer they last, the more likely it is that Student will gain sustained adult attention, avoid non-preferred activities and obtain the opportunity to engage in preferred activities instead of challenging academic tasks. There is no doubt that at times it is necessary to remove Student from the classroom for his own safety and to protect

others, especially peers. While Student is out of the classroom, he must, of course, be accompanied by an adult, and there was testimony that Student is frequently encouraged to engage in preferred activities to calm himself enough to return to the classroom and resume regular school activities. *See, e.g.*, N.T. pp. 61, 62, 76, 80, 126, 127 Although these measures are necessary to avoid injury to Student or others, including staff, and to minimize the property damage Student can inflict, it is not surprising that the behaviors appear to be increasing when the behaviors often lead to Student getting exactly what he most wants. It is essential that Student's extreme behaviors be addressed in a setting that can better assure that the functions of the behaviors are not served by the consequences necessary to protect Student and others.

There was little testimony concerning the reactions of other students in the same classroom to Student's periodic instances of extreme behavior, other than to note the number of times the other children had to be removed from the classroom for their own safety, and that some students had been upset when their work was destroyed during one such incident. F.F. 13, 14; N.T. p. 71 All of Student's classmates, however, also have significant special education needs, or they would not be assigned to a full-time learning support class. Presumably, at least some of the other students also have behavioral needs, since there is a class-wide behavior management plan in place. F.F. 7 Every time Student has an episode of violent or aggressive behaviors, the other students' special education programs are interrupted and their belongings and personal safety are placed at risk. In addition, it is reasonable to infer that at least some of the other students may also have difficulties with transitions, need orderly, predictable routines and advance notice of schedule changes. The District surely cannot fully implement such provisions in other students' IEPs during Student's extreme and unpredictable behavior incidents.

Finally, if the other students have not yet observed that the consequences of Student's extreme behaviors can be additional one-to one time with an adult, and demand/task avoidance, it is not unreasonable to expect that challenging behaviors may increase among the other students in the learning support classroom. Even if that does not occur and the other students' behaviors remain generally under control, periodic disruption to their educational programs is inevitable under the present circumstances.

For all of the foregoing reasons, a change of Student's placement to a more restrictive setting is warranted due to the District's present inability to effectively address Student's violent and aggressive behaviors in the present full-time learning support setting. The District also provided evidence that it cannot appropriately provide for Student's behavioral needs and significant academic needs in any other classroom setting within the District. F.F. 17

The District also contended that Student's immediate change of placement should be to an alternative school on an interim, relatively short term basis for evaluative purposes. In support of that position, the District provided ample evidence that a full evaluation is needed to explore the underlying cause(s) for the extreme behavior incidents, as well as to provide a basis for developing an appropriate behavior plan. It is obvious from the record that Student is desperately in need of an effective plan that that will ultimately eliminate the violent and aggressive behavioral outbursts, and an immediate transfer to a school setting that can initiate measures as soon as possible to reduce such incidents. It is also obvious that in order to enhance the chances that the interim placement will result in developing a truly effective behavior plan, additional evaluation data is needed to determine the full effect of any current, or as yet undiagnosed/unidentified disability, on the aggressive and violent behavior outbursts, as well as how to effectively address any such effect.

In addition to the requirements found in 20 U.S.C. §1415(k)(1)(D)(ii) and (F)(i), (ii), concerning an FBA and behavior plan when there is a change of placement to address behavior needs/discipline concerns, the IDEA statute and regulations generally provide that the District should initiate an evaluation/reevaluation when “the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child’s parent or teacher requests a reevaluation.” 20 U.S.C. §1414(a)(2)(A)(i), (ii); 34 C.F.R. §300.303(a).

The circumstances presented by this case certainly warrant a reevaluation under that standard. Consequently, in addition to ordering Student’s change of placement in accordance with the District’s request, the District will be ordered to conduct a full evaluation/reevaluation, in conjunction with the alternative school, without the need to obtain explicit parental consent. In this case, the District should not be required to resort to the consent override provisions found in 34 C.F.R. §§300.300(c)(1)(ii) and 300.507(a) should Parent disagree with the need for an evaluation, or with any of the assessments, instruments or matters identified for evaluation. The evidence at the hearing amply supported the need for a comprehensive reevaluation/evaluation, as well as the need for an immediate change of placement. No good purpose served by an additional due process hearing concerning an evaluation should the District be required to seek parental consent and it is refused.

In accordance with IDEA standards, the District will be explicitly ordered to review existing evaluation and classroom observation data to identify all additional data/assessments/examinations necessary to determine Student’s current educational needs, present levels of academic achievement, related developmental needs and other matters found in 34 C.F.R. §300.305(a)(1), (2)(B). In addition, in selecting new or additional evaluative measures

the District will be ordered to assess Student in all areas related to any presently identified disability, as well as any additional suspected disability, such related areas to include health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. 300.304(c)(4). Finally, the District will be ordered to assure that the evaluation is sufficiently comprehensive to “identify all of the child’s special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified,” 34 C.F.R. 300.304(c)(6), and to assure the use of assessment tools and strategies that provide relevant information reasonably necessary to determine all psychological/ psychiatric social/developmental, behavior and other needs of the Student that are affecting his educational progress, particularly classroom conduct.

#### Appropriateness of the District’s Proposed Alternative School

The overwhelming weight of the evidence produced at the hearing establishes that the APS the District proposes as the immediate new placement for Student meets the legal criteria for an appropriate interim alternative placement, in general, and has the ability to fulfill the specific purposes for which the District seeks an alternative placement for this Student. F.F. 28, 29, 30 The MCIU behavior analyst’s conclusion that the school can effectively address Student’s needs is based on her extensive professional experience with Students who attended the school and successfully returned to their prior school settings, as well as observations of both Student and the alternative school classrooms. Because the behavior analyst is not a District or alternative school employee, she was not a witness with a personal/professional interest in the outcome of the proceedings other than to present a careful recommendation for an effective placement for Student in accordance with objective professional standards. That enhances her

objectivity and contributes, along with her forthright, credible testimony, to giving her opinion substantial weight.

### **CONCLUSION**

The District will be ordered to assign Student to [Redacted school], as the District requests, for a 45 day interim placement and evaluation as described above. After that period ends, the Student's IEP team, including Parent, will be directed to assess Student's progress in the alternative placement, especially the extent to which the violent and aggressive behaviors have continued to occur, and whether all evaluative measures have been completed, including any which may be identified after initial assessments are conducted. At that point, the IEP team will be directed to develop a new IEP based on the evaluation data and Student's experience at the alternative school, as well as determine an appropriate placement for the 2010/2011 school year, which may be the alternative school or another setting, including return to a District classroom.

In order to assure that an appropriate setting is identified for Student in time for the beginning of the 2010/2011 school year, the District will be directed to continue exploring other private placements to determine whether any might be appropriate for Student, and, if so, whether any such program can offer Student admission for the 2010/2011 school year.

### **ORDER**

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

1. Transfer Student to the [Redacted school] Approved Private School for a 45 day interim placement as soon as possible; at the option of the District, days spent receiving ESY services at [Redacted school] may be counted toward the 45 days or not;
2. Conduct a thorough observation of Student in his current classroom setting unless such an observation has been conducted within the past thirty (30) days;

3. In consultation with the [Redacted school], initiate a comprehensive evaluation/reevaluation of Student, with the date of this order to serve the same function as the date appearing on a signed permission to evaluate/reevaluate with respect to the evaluation timeline. Such evaluation shall include, but is not limited to:
- a. Fulfilling all requirements set forth in 34 C.F.R. §300.305(a)(1), (2)(B);
  - b. Identifying and conducting all evaluative measures/assessments necessary to fully assess Student in all areas related to any presently identified disability, as well as any additional suspected disability, such related areas to include health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities, in accordance with 34 C.F.R. §300.304(c)(4);
  - c. Assuring that sufficiently comprehensive data is compiled to identify all of Student's special education and related service needs, whether or not commonly linked to the current ADHD, communication disorder and sensory disorder disabilities already identified;
  - d. Assuring that the assessment tools and strategies selected provide relevant information reasonably necessary to determine all psychological/ psychiatric social/developmental, behavior and other needs of the Student particularly as those needs may be affecting Student's educational progress, especially school/classroom behaviors.
4. Continue exploring public and private educational settings that may be appropriate for Student for the 2010/2011 school year;
5. Convene Student's IEP team at or near the end of the 45 day period to assess his behavioral and educational progress in the alternative placement, focusing especially on the extent to which episodes of violent and aggressive behaviors occurred in that setting, and whether all evaluative measures are completed, including any which may be identified after initial assessments are conducted.
6. Convene Student's IEP team, at the same time or on a different day, to develop a new IEP based on the evaluation data and Student's experience at the alternative school, and to determine an appropriate educational setting for the 2010/2011 school year, which may be the [Redacted school] or another setting, including a District classroom, based upon Student's needs at that time..

April 28, 2010

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER