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Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: B.W.

Date of Birth: [redacted]

Dates of Hearing:  
December 10, 2010  
February 3, 2011

CLOSED HEARING

ODR Case # 01671-10-11-AS

Parties to the Hearing:

Parent[s]

Upper Darby School District  
4611 Bond Avenue  
Drexel Hill, PA 19026

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Scott Gottel, Esq.  
Holsten & Associates  
One Olive Street  
Media, PA 19063

February 3, 2011

February 18, 2011

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is an early teen-aged student residing in the Upper Darby School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>. The student has been identified as a student with an emotional disturbance and specific learning disabilities. The District feels that the student requires therapeutic services as part of the student’s educational program and recommends that the student be placed in a private placement outside of the District. The Parent counters that the student’s placement should remain at the District.

For the reasons set forth below, I find in favor of the student.

### **ISSUE**

Is the District’s proposed change in placement appropriate for the student?

### **FINDINGS OF FACT**

1. The student has attended District schools since early elementary school. (School District Exhibit [“S”]-19).
2. In the 2008-2009 school year, the student was in 6<sup>th</sup> grade, the first year at a District middle school. In a re-evaluation report

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<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

- (“RR”) completed in February 2009, the student continued to be identified as a student with learning disabilities and an emotional disturbance. (S-19).
3. The RR noted that the student has a history of difficulty maintaining adult and peer relationships in the school environment. The RR also noted that the student has, at times, exhibited inappropriate behavior in school. (S-19).
  4. The student’s individualized education plan (“IEP”) for 7<sup>th</sup> grade, the 2009-2010 school year, was prepared in March 2009 and revised in June 2009. (S-16).
  5. This IEP included a behavior support plan that was prepared at some unspecified point in 6<sup>th</sup> grade. (S-16).
  6. The IEP was revised again in September 2009, shortly after 7<sup>th</sup> grade had begun, in order to add weekly instruction in social skills, to add or enhance goals in appropriate social interaction and appropriately handling redirection, and the addition of as-needed consultation between teachers and a behavior consultant. These changes were approved by the parent in a notice of recommended educational placement (“NOREP”) signed on September 25, 2009. (S-14-A, 14-B, S-16).
  7. Because the 6<sup>th</sup> grade behavior support plan addressed similar problematic antecedent behaviors and sought similar replacement

- behaviors, the behavior support plan was not amended at the September 2009 IEP team meeting. (S-14-A, S-16; NT at 81).
8. In 7<sup>th</sup> grade, the student received language arts instruction in a learning support environment and math instruction in an emotional support environment, and was included in regular education for other academic instruction. (S-14-A; Notes of Testimony ["NT"] at 75).
  9. The student made adequate progress through the first half of 7<sup>th</sup> grade. Beginning in January 2010, however, the student began to exhibit elevated levels of agitated and oppositional behaviors in class, often refusing to do school work or asking to leave the classroom. (NT at 75-76, 83).
  10. The student had a long-running feud with other students in the school. In January 2010, the student was involved in a fight on the grounds of, or near, a District elementary school. (NT at 64, 211-212, 292-296).
  11. The parent contacted the middle school on multiple occasions to complain that the student was being bullied. Upon investigation, the District determined that there was no bullying, in the District's definition of the term "an imbalance of power, something that's ongoing, something that is one-sided". Instead, the District found that the incidents were instigated by the

student, or mutually instigated, or mutually engaged in. (NT 87, 150-151, 211-219).

12. In February 2010, due to parental dissatisfaction with the administrative response to the student's situation, the District assigned a new administrator to begin working with the student. (NT at 213-214).
13. By March 2010, the student's IEP team met for the annual review of the student's IEP. The team discussed the student's increasingly problematic behaviors. Because of difficulties in the student's social skills group, including non-engagement and oppositional behaviors, the student's IEP was changed instead to include twice-weekly counseling sessions with a District school psychologist. The school-based members of the IEP team also recommended an aide to assist the student. While the family was initially resistant to this modification, eventually the student's IEP included a full-time aide to assist the student with classroom organization issues and transitions throughout the school day. (S-12-A, S-13; NT at 83-92, 230-231).
14. At the IEP meeting, the team also discussed private placement for the student. (NT at 482).
15. A re-evaluation also began in March 2010. (NT at 99, 382-383).

16. On April 13, 2010, the student was involved in a serious behavioral incident at the school. [incident redacted] After some time, the student was eventually brought to the office by an administrator and school security personnel and local law enforcement was summoned to the school. The student was not arrested and was released to the custody of parent. (NT at 239-252).
17. Because the incident would result in discipline in excess of 11 school days, and that the District felt it was the latest incident in a pattern of incidents, the District met for a manifestation determination hearing. (S-11).
18. A manifestation determination hearing was held on April 19, 2010. The meeting was described as having a degree of hostility and ill-ease. At the manifestation determination hearing, the school-based members of the IEP team recommended that the student's educational placement should be changed to a private placement outside the District where the student could receive a therapeutic component in educational programming. The parent disagreed with the conclusion of the school-based team. (S-11; NT at 97-98).
19. On April 30, 2010, a RR was issued as the result of the evaluation process that the student had been undergoing throughout March and April. The RR recommended that the

student's primary identification be changed to emotional disturbance and specific learning disabilities be changed to a secondary identification. (S-10).

20. On May 20, 2010, the student's IEP team met. The District continued to believe that the student required a private placement outside of the District. The parent and the District agreed to continue the student's District-based placement but to investigate private placements. There was a misunderstanding between the District and the parent coming out of this meeting: the District was seeking a permanent change (that is, a non-trial placement) to a private placement with a therapeutic component but the parent understood this change in placement to be, as was noted on the parent's approval of the NOREP, "a 60-day trial period @ (an approved private school)". (S-2, S-8; NT at 477-484).

21. Shortly after the IEP meeting, the District sent letters of inquiry and materials related to the student to multiple private placements. (S-5, S-6, S-7; NT at 484-486).

22. Over the course of the summer, a scheduled June visit at one of the private placements never took place because the student's parent was reluctant to consider that placement. Another visit took place in August at a second private placement. Again, a misunderstanding ensued as the result of how each party viewed these visits. The District viewed the visits as an attempt to

facilitate a permanent change in the student's educational placement; the parent viewed the visits as a preview of a mere 60-day trial placement. When these different views of the process and goals related to a private placement came to light in late August, the parent was no longer interested in pursuing a private placement. (S-4; NT at 486-497).

23. On August 26, 2010, the District issued a NOREP with a clear recommendation for a full-time private placement without any trial period. The parent rejected the NOREP on September 1, 2010. (S-2, S-3).
24. The IEP team met again in October 2010 and, again, the District proposed a full-time private placement. A note at the top of the NOREP indicates that parent did not sign the NOREP in any way. (S-1).
25. For the current 2010-2011 school year, the student's 8<sup>th</sup> grade year, the student attends a program similar to the 7<sup>th</sup> grade program, with some instruction received in a learning support environment, some instruction received in an emotional support environment, and some instruction received in a regular education environment. (NT at 141-142, 470-472).
26. The special education teacher who delivers math instruction in the emotional support environment reports that, in the current school year, the student has exhibited the same type of behaviors



in the classroom that the student has previously exhibited and that those behaviors interfere with instruction. (NT at 145-148, 150-158).

27. The student continues to exhibit problematic behaviors across multiple settings according the daily log kept by the student's aide. (S-23).

28. The student's behavior plan from 6<sup>th</sup> grade was not discussed at the October 2010 IEP meeting. (NT 147-149).

### **DISCUSSION AND CONCLUSION OF LAW**

To assure that an eligible child receives free appropriate public education,<sup>2</sup> an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”<sup>3</sup> “Meaningful benefit” means that a student’s program affords the student the opportunity for “significant learning”,<sup>4</sup> not simply *de minimis* or minimal education progress.<sup>5</sup>

Both federal and Pennsylvania law require that the placement of a student with a disability be in the least restrictive environment (“LRE”), considering the full range of supplemental aids and services that would

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<sup>2</sup> 34 C.F.R. §300.17.

<sup>3</sup> Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>4</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

<sup>5</sup> M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

allow a student to receive instruction in the LRE.<sup>6</sup> Pursuant to 34 C.F.R. §300.114(a)(2):

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

Pennsylvania special education regulations mirror this emphasis on LRE. Where a student “can, with the full range of supplementary aids and services, make meaningful education progress on the goals in...the IEP”, a school district cannot require separate schooling for a student.<sup>7</sup> Similarly, “(a) student may not be removed from...(a) placement in a regular education classroom solely because of the nature or severity of the student’s disability, or solely because educating the student in the regular education classroom would necessitate additional cost or for administrative convenience.”<sup>8</sup>

In this case, the student’s behaviors clearly present a challenge in the learning environment. (FF 3, 5, 6, 9, 13, 16, 26). And ultimately, the student may need to be educated outside of the District.

But based on this record, the District has failed to afford a more restrictive environment within District programming before it recommended

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<sup>6</sup> 34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993).

<sup>7</sup> 22 PA Code §14.145(3).

<sup>8</sup> 22 PA Code §14.145(4).

that the student be placed in a private placement. First, the student has been receiving language arts instruction in a learning support classroom and mathematics instruction in an emotional support classroom, with the remainder of instruction provided in a regular education environment. (FF 8, 25). The student has also received social skills and counseling at various points. (FF 6, 13). Yet the calculations time which the student spent, or spends, in special education and regular education environments is muddled across all of the student's IEPs. (FF 4, 6, 13, 20, 25). This, coupled with testimony which makes it appear that the student has been in roughly the same types of educational placements over the course of 7<sup>th</sup> and 8<sup>th</sup> grade, makes it very difficult to ascertain the degree of restrictiveness *within* District placements. As such, this record does not clearly support the assertion that the District has attempted, in an effort to provide programming within the District and avoid an out-of-District placement, to make the student's placement within the District more restrictive.

Second, the student's behavior support plan has not been revised over the course of these events. (FF 5, 7, 28). While much of the behavior in the support plan is similar, the District must recognize the difficulty surrounding a recommendation to exclude the student entirely from a public school environment, based on significant behavior difficulties, when, at least as of February 2011, it had not performed a functional behavior assessment since, at least, June 2009 (the tail-end of the student's 6<sup>th</sup> grade year, although it is unclear, exactly, when in the student's 6<sup>th</sup> grade behavior support plan was

developed [FF 5]). This is especially troubling given the extreme nature of the April 2010 behavior incident and the fact that the District was in the midst of re-evaluation process that had not yet concluded when the District held the manifestation determination hearing. (FF 16, 17, 18, 19).

As indicated above, it may well be that the student requires a private out-of-district placement. But at this point, based on this record, the District must do more in terms of a functional behavior assessment and gauging the restrictiveness of its own programming before the student can be entirely excluded from the District. An order will be crafted accordingly.

### **CONCLUSION**

The District has not utilized a functional behavior assessment to ascertain how it might address the student's elevated levels of problematic behavior. Additionally, it is unclear to what degree the District has attempted to make the student's programming more restrictive within the District. Accordingly, the District must take additional steps to ensure the student is educated in the LRE before it moves to recommend that the student be placed full-time in a private placement.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, within 30 calendar days of the date of this order, the District shall undertake and issue a functional behavior assessment of the student in classrooms (both special education and regular education), cafeteria, and hallway settings. Once the functional behavior assessment has been issued, the IEP shall convene within 10 calendar days after the date of the issuance of the functional behavior assessment to consider the full spectrum of settings, placements, supports, and programming available to the student within the District.

*s/Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

February 18, 2011