

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

DUE PROCESS HEARING

Name of Child: J.P.
ODR #01683/10-11 JS

Date of Birth:
[redacted]

Dates of Hearing:
December 6, 2010
December 20, 2010

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Pocono Mountain School District
PO Box 200
Swiftwater, Pennsylvania 18370

Date Record Closed :

Date of Decision:

Hearing Officer:

Representative:

Drew Christian, Esquire
801 Monroe Avenue
Scranton, Pennsylvania 18510

Rebecca Young, Esquire
King Spry
One West Broad Street, Suite 700
Bethlehem, Pennsylvania 18018

January 17, 2011

January 18, 2011

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

Background

Student¹ is a kindergarten child who entered the District in September for the 2010-2011 school year after receiving Early Intervention services delivered in the daycare center. Pursuant to an evaluation prior to kindergarten entrance the District found Student ineligible for special education, but after several days in kindergarten Student's behaviors reflected need for a re-evaluation and Student was found eligible. However, as Student's Parents disapproved the proffered IEP and NOREP, citing LRE issues among others, Student remained in regular education at the time of the hearing.

Parents requested this hearing alleging denial of FAPE as articulated in the Issues section. For the reasons put forth below I find for the Parents.

Issues

1. Did the School District deny Student a free appropriate public education through failing in its child find obligation?
2. Did the School District deny Student a free appropriate public education by proffering an IEP that is inappropriate in the areas of present educational levels, goals, specially designed instruction, behavior support, social skills support, and occupational therapy support?
3. Did the School District deny Student a free appropriate public education by not proposing the least restrictive environment for Student, or alternatively not providing an appropriate transition plan if Student was to be moved from the present environment to a more restrictive environment?

Findings of Fact

Child Find

1. Prior to entry into the District, Student received itinerant Early Intervention services in the areas of behavior and occupational therapy delivered in the preschool center through the IU. [NT 24, 55, 87, 308-309, 322; P-2]
2. In May 2010 the District issued and the Parents signed a Permission to Evaluate, and the District evaluated Student; the report was issued on August 26, 2010, approximately four days before the start of school on August 30, 2010. [NT 23-24, 309-310; P-2]
3. The evaluation consisted of: input from the Parents; review of two previous preschool IEPs; review of previous testing; review of preschool teachers' input forms; observation during kindergarten registration; informal interview; and administration of Bracken Basic Concepts Scale - Revised [Bracken], Wechsler

¹ The decision is written without further reference to the Student's name or gender to provide privacy.

- Preschool and Primary Scale of Intelligence – Third Edition [WPPSI-III], Beery-Buktenica Developmental Scale of Visual-Motor Integration – Fifth Edition [Beery VMI], Behavior Assessment System for Children – Teacher Rating Scale – Preschool [BASC-2], Conners’ Teacher Rating Scale – Revised – L and Conners’ Parent Rating Scale – Revised –L. [P-2]
4. Parent input for the evaluation included information that Student displayed aggression, recent hitting and spitting, impulsivity, poor listening skills and difficulty transitioning. [NT 30; P-2]
 5. The Parents suspected that Student had ADHD. [NT 30-31, 315; P-2]
 6. Preschool teachers’ input from the May 2010 IEP noted needs as follows: “more one on one care to function independently in the classroom; a place to escape when feeling upset; assistance with ability to control aggression and self-help skills”. [P-1, P-2]
 7. Preschool teachers’ input provided for purposes of the evaluation noted Student was: academically below average, not able to manage anger, not being able to function in a large group setting, not being able to join in on child’s play [sic], not being able to play cooperatively, having difficulty explaining [Student’s own feelings] making anger management harder, getting upset easily then swinging at other children, dealing with emotions by lashing out at everything and everyone around Student, and not adapting well to change. [P-2]
 8. Although Student had behavior problems in preschool, the Parents did not want Student prejudged based on behavior in that setting, thinking that behavior might be different upon entry to school. The Parents would not allow the District to observe Student in the preschool center as part of the evaluation. The District psychologist testified that he therefore viewed the preschool teachers’ input “in a slightly less powerful light” because he “surmised” that perhaps the preschool teachers were “setting Student up” or that it was “some sort of a relationship problem with them”. [NT 55, 90-92, 312, 331-333]
 9. The Bracken was administered by the District’s educational consultant. The evaluator believes the obtained scores were valid. On the Bracken, Student scored in the Average Range, at the 37th percentile, on the School Readiness Composite and at the Average Range 25th percentile on Time/Sequence, but was in the Delayed Range on all other dimensions – Direction/Position [16th %ile], Social/Self Awareness [9th %ile], Texture/Material [16th %ile], and Quantity [16th %ile]. The Total Standard Score was 85, in the Delayed Range. [NT 234, 242; P-2]
 10. On the Bracken the areas of delay included receptive language skills, giving an assessment of how well a student is able to take in information and use it, for example in the area of social skills and self-awareness. The District’s educational consultant opined that Student’s deficits in these skill areas did not cause her to

- identify needs: “[Student] did well with the academic portion of it, the school readiness skills [letter identification, numbers, shapes, colors]. They fell within the average range, and therefore it did not indicate any skill deficits that would impact [Student’s] ability to...not perform well in kindergarten”. [NT 239-241, 303-305]
11. Because of his review of previous material indicating behavioral concerns, the District psychologist deviated from his usual testing procedure and allowed the mother to remain in the room while Student was being tested. [NT 96-99]
 12. The District psychologist chose to administer an abbreviated cognitive test, such that a Full Scale IQ could not be recorded and the reported IQ scores were prorated. Additionally the psychologist discarded a subtest for which Student would have received a zero raw score, deciding that fatigue was a factor. The evaluator did not assess Student in the area of processing speed. On the WPPSI-III on the limited basis of two subtests on each scale Student received a Verbal IQ of 102 (Average Range) and a Performance IQ of 86 (Low Average Range).² [NT 35-36, 40-43; P-2]
 13. The reasoning for the abbreviated cognitive testing was Student’s apparent fatigue. The District psychologist could have scheduled a second day to complete administration of the WPPSI-III but chose not to do so. [NT 36]
 14. On the Beery VMI, Student did “poorly”, achieving a standard score of 73, at the 4th percentile, which placed visual-motor coordination in the Low Range. This finding suggests that Student’s visually perceiving and reproducing material by writing may be an area of “considerable challenge”. [NY 44; P-2]
 15. Student’s preschool teachers’ endorsements on the BASC-2 questionnaire yielded Clinically Significant [area of “significant challenge”] scores on the scales of Hyperactivity, Aggression, Atypicality, Withdrawal and Attention Problems, and At-Risk [areas that should be monitored as they could become problematic] scores on the scales of Depression, Adaptability, and Functional Communication. Externalizing Problems and Behavioral Symptom Index were Clinically Significant and Adaptive Skills were At Risk. [P-2]
 16. On the Connors’ questionnaire, the preschool teachers’ ratings contributing to thirteen dimensions placed Student in the Markedly Atypical Range on eleven of the scales: Oppositional, Cognitive Problems/Inattention, Hyperactivity, Perfectionism, Social Problems, Connors’ ADHD Index, Connors’ Global Index – Restless-Impulsive, Connors’ Global Index – Emotional Lability, Connors’ Global Index – Total, DSM-IV Hyperactive-Impulsive and DSM-IV Total. One

² In contrast to his testimony that Student’s verbal abilities were better than non-verbal abilities, a conclusion supported by the limited, prorated data, the written report notes that Student’s scores on measures of nonverbal abilities are significantly better than they are on measures of verbal ability (page 12 of P-2, end of second paragraph). Undoubtedly this is an error that was not caught during proof reading.

area, Inattentive, was Moderately Atypical, and only one area, Anxious-Shy, was Not Problematic. [P-2]

17. The preschool teachers who responded to the questionnaires and provided written input were Student's teachers the year prior to kindergarten entry. Their responses showed "a high degree of concern" as characterized by the District psychologist in testimony. [NT 45-47]
18. In contrast, the Parents' responses reflected better functioning in the home setting than in the preschool setting, with no Markedly Atypical scores and no Moderately Atypical scores. All other scores were Mildly Atypical, Slightly Atypical, or Not Problematic. The District psychologist hypothesized that Student's behavior was "substantially better at home than at preschool". [NT 49; P-2]
19. Based upon its evaluation, the District found Student not to have a disability and therefore ineligible for special education services. [NT 26; P-2]
20. The District issued a NOREP advising the Parents that Student was not eligible for special education services. [NT 25-26; P-2]
21. The District recommended that the Parents use the evaluation for informational purposes should they wish to pursue with a physician or other qualified professional "further examination of attentional and behavioral issues" to determine if Student has a "medically-based" condition. The District did not issue a PTE for a psychiatric evaluation or a neurological evaluation to resolve this issue as part of an MDE. [P-2]
22. The District did not schedule or recommend an Occupational Therapy evaluation for Student; it did not consider OT a special education service. [NT 45; P-2]
23. The evaluation did not recommend that Student's behavior be monitored upon entrance into school, even in light of previous eligibility and the behaviors described by the preschool teachers who had very recent experience with Student. [NT 63-64]
24. The Parents disagreed with the evaluation report and noted "further testing required". [NT 311; P-2]

Re-Evaluation

25. On the first day of kindergarten Student demonstrated extreme acting out behaviors. Student was physically aggressive to staff and students. Student had many behavioral outbursts and was not responsive to adult direction. [NT 243]
26. On August 31st, the second day of kindergarten, at an already-scheduled meeting the staff put aside the previous plan to review the evaluation report with the

- District psychologist and instead held a “crisis meeting” to discuss Student’s behaviors and to formulate some behavioral interventions to try with Student. The District psychologist testified to being “substantially surprised” because he had “not anticipated that [Student’s] behavior had been anywhere near that level from the information provided”. [NT 103, 107]
27. On September 7th the District met about Student and brought the Parents into the meeting by speakerphone toward the end. The decision was made to “reopen” the evaluation, and the District issued a Permission to Re-Evaluate which a District staff member took to the mother’s workplace and which the mother immediately signed. [NT 109-110, 313, 327; S-5]
 28. Behaviors Student exhibited included hitting other students, throwing things at other students, hitting school staff, throwing things across the room, running from the designated area, yelling in the classroom, yelling at people, knocking over other students’ things, persistently asking for Student’s parents, wanting to go home, and wanting to leave the room. [NT 108-109]
 29. Additional behaviors in school included refusing to engage in schoolwork [“quickly says ‘I can’t do this’”], crying, refusing to give eye contact, not responding to attempts by others to communicate, pulling peers’ hair, swinging scissors at a teacher, name calling [“jerk”, “idiot”], threatening to kick or bite others, and licking the classroom aide, the floor and a shoe. [S-10/P-6]
 30. The re-evaluation report was issued on October 1, 2010. Part of the Reason for Referral read as follows: “Due to [Student’s] behavioral difficulties upon entry into kindergarten, *and behavioral difficulties that had occurred at the [redacted] Preschool prior to entry into PMSD*, [Student] has been referred for an initial³ evaluation...”. [S-10/P6]
 31. New information in the re-evaluation was observation of Student in the school setting, behavioral questionnaires completed by Student’s current teachers, a speech/language evaluation, an occupational therapy evaluation, a functional behavior assessment and a psychiatric evaluation. [NT 110-112; S-10/P-6⁴]
 32. Results of the Functional Behavior Assessment are congruent with the observations and concerns made available in writing to the District by Student’s preschool teachers at the time of the first evaluation in August. [P-7]
 33. Results of the SAED, a standardized questionnaire designed to assess whether a Student would qualify for the classification of Emotional Disturbance, found Student to be “likely” [as opposed to unlikely or very likely] to meet criteria in three of five areas: Relationship Problems, Inappropriate Behavior, and

³ The report clarifies that this evaluation is considered an initial evaluation because Student was not receiving special education services at the time of referral for the October 1st evaluation. [S-10/P-6]

⁴ When an S exhibit and a P exhibit are referenced as S/P it denotes that the exhibits are duplicates.

- Unhappiness or Depression. The finding was also that Student's behaviors affected educational performance at a "3" rating meaning "to a considerable extent". [S-10/P-6]
34. Although Student was not found to be in need of speech/language therapy, Student was found to demonstrate "significant difficulty" with motor planning skills, in hand manipulation, motor coordination, school tool skills, and handwriting development. Occupational Therapy [OT] was recommended once a week for 30 minutes each session under the direct service model. [S-10/P-6]
 35. Upon re-evaluation the District found Student eligible for special education under the classification of Other Health Impaired. Student was diagnosed as having Attention Deficit Hyperactivity Disorder [ADHD] and Oppositional Defiant Disorder by the District psychiatrist. [S-10/P-6]

IEP

36. Pursuant to the October 1st evaluation, an IEP meeting was held on October 12th. Parents were accompanied by an advocate. [NT 116]
37. The District proposed placing Student in an emotional support classroom (likely with no more than ten students) for 73% of the school day. The Parents rejected the October 12th NOREP partially because they were concerned that Student would not be exposed to peer models whose behaviors were appropriate. [NT 159, 274, 318; S-14]
38. After discussions with the Parents, on November 19th the District proposed a reduction of Student's time in an emotional support classroom to 48% of the time. Placement in the emotional support classroom would necessitate the child's moving to another school building in the District and given Student's difficulties with transition the Parents believe this is not appropriate at this time. [NT 161, 320-321, 331; S-21]
39. The Parents are not opposed to their child's receiving special education services. They believe that the proposed program and placement are inappropriate. [NT 148-149, 319-321, 330]
40. The District's IEP dated October 12, 2010 has only two annual goals: Improving ability to stay on task in the classroom from 60% to 85% with three or less prompts and Complying with teachers' request during transitions with 85% accuracy with three or less prompts. [P-10]
41. The two goals in the October 12th IEP are the same goals as in the behavior support plan. [NT 157-158; P-7, P-10]
42. The educational consultant opined that an area of need or of concern does not have to be addressed within a measurable annual goal if it is addressed in an FBA,

- specially designed instruction or accommodations within the IEP. “Goals are used to monitor progress. So it might be an area of need, but we can monitor the progress overall in an area”. [NT 156-158, 182]
43. Despite areas on the Bracken in which Student scored in the Delayed Range the October 12th IEP does not carry goals to address these areas. The educational consultant offered the opinion that she “would not label these as areas of concern”. [NT 155; S-10/P-6 P-10]
 44. Although Student demonstrates social skills deficits, the October 12th IEP’s present levels of educational performance [PLEPS] do not contain quantifiable behavior descriptors from which goals can be written. [NT 150-151, 158; P-10]
 45. The October 12th IEP does not have any measurable annual goals to address social skills deficits. [NT 152; P-10]
 46. Although Student demonstrates problems with aggression, the October 12th IEP does not put forth a quantifiable baseline for verbal or physical aggression and does not describe a desired quantifiable outcome. [NT 151-152, 158; P-10]
 47. The October 12th IEP does not have any measurable annual goals designed to address verbal and physical aggression. [NT 152; P-10]
 48. Although Student demonstrates significant difficulties in the areas of motor planning skills, hand manipulation, motor coordination, tool skills and handwriting development the October 12th IEP does not have any annual measurable occupational therapy goals to address these deficits. [NT 156-157, 158; P-10]
 49. The District offered another IEP dated November 19, 2010. [P-15]
 50. Although Student still had difficulty with staying on task and transitioning, the two October 12th IEP goals for those needs were dropped, and two new goals were created: “In the classroom [Student] will increase ability to cope with frustrating situations by reducing the number of times [Student] whines (cries) from a baseline of three times per school day to zero for three consecutive weeks” and “In the school setting [Student] will increase ability to keep hands, feet and objects to []self by decreasing the baseline of 5 incidents per day to zero incidents per school day for three consecutive weeks”. [NT 184-185; P-15]
 51. Despite Student’s continuing to have social skills deficits, the November 19th IEP does not have any measurable annual goals related to social skills deficits. [NT 186-187; P-15]
 52. Although Student’s need to learn/acquire social skills is addressed in the positive behavior support plan included in the November 19th IEP, in that plan there are no

goals, no baselines, no target points and no descriptions of progress monitoring. The educational consultant maintains that these elements are not necessary. [NT 187, 222; P-15]

53. The positive behavior support plan and the November 19th IEP goals put forth what Student will not do, rather than what Student will do to replace problem behavior. The positive behavior support plan does not specify exactly what discrete social skills Student will be taught.⁵ [P-15]
54. The November 19th IEP indicates that OT goals were attached, but it is unclear whether they were attached to the copy of the IEP the Parents were given. [S-20]
55. There are no goals in the November 19th IEP or the attached OT portion addressing sensory integration although sensory integration was to be addressed through a program called “How Does Your Engine Run?” [NT 279; S-20, P-15]
56. The November 19th IEP does not include guidance counseling as a supportive service despite Student’s having made good use of individual work with adults, including the guidance counselor, when becoming upset. [P-15]
57. As an IEP and NOREP have not yet been implemented, Student has not received occupational therapy services so far this school year although Student received these services the previous year in preschool. [NT 321]

Program/Placement/LRE

58. At the August meeting on the second day of school the District decided to implement or already had been implementing the following regular education Behavioral interventions with Student: speaking privately about expectations; restating expectations daily; offering alternative problem-solving strategies; teaching self-monitoring techniques; differentiated classroom rules and compliance expectations; modeling desired behavior and appropriate socialization skills; preferential seating [physical proximity to teacher]; maintaining predictable schedule; visual cues; timely rewards and immediate feedback verbally and through concrete reinforcers [WISH tickets]; frequent breaks; altered environment; and consistency across school environments. [NT 106-107, 133-134; S-9]
59. At the August meeting the District decided to implement or already had been implementing the following regular education Academic interventions with Student: additional individual attention/help from teacher; adapted instruction/materials at instructional level [chunking, extended time, reteaching

⁵ A student with social skills deficits may need to learn how to initiate and sustain a conversation, how to ask to join a game, how to apologize after making a mistake or accidentally bumping into someone, and the plan should indicate how these types of skills will be taught, for example through practicing eye contact, scaffolding conversations, etc., and how acquisition will be measured.

- and retesting, guided practice and repetition, use of visuals and hands-on materials]; computer-assisted instruction for phonics skills. [NT 106-107; S-9]
60. At the August meeting the District decided to implement or already had been implementing the following regular education Partnership with Parents interventions: homework/homework book signed by parent; daily parent-teacher email; periodic phone calls and team meetings; sharing successful techniques in each setting; positive phone calls as rewards. [NT 106-107; S-9]
 61. For a period of time a classroom aide was assigned to Student. [NT 126]
 62. Student has participated in whole-class guidance groups with kindergarten peers. The groups are held once every 6 days for 30 minutes each. [NT 339]
 63. The guidance counselor, who has 25 years experience as a guidance counselor and had early work experience in a daycare center with three and four year olds observed the Student has made gains. Student started out struggling and exhibited behaviors more extreme than other kindergartners but over the past four months has worked very hard to try to follow the other students, and to participate on a level where Student feels successful. [NT 340]
 64. In the guidance group Student can attend, interact positively, model the good behaviors in the group, and get something from the group. Student can complete the task assigned, listen to a story, and participate fully in different activities. [NT 340]
 65. During the first two months of school Student had behavioral difficulty in the less structured cafeteria setting. During the past two months Student has made positive gains in that Student has been able to come in unassisted and do what Student has to do. Part of the improvement may be due to participation in the guidance groups on “eating”. [NT 341-342]
 66. According to the kindergarten teacher Student has made adequate academic gains so far this year in keeping with peers. Student is following along nicely with academic skills. [NT 358]
 67. The kindergarten teacher testified that although Student still becomes frustrated, whereas before Student would take it out in violence or crawling under the table, now Student will come and talk to the teacher and works through frustration. [NT 358-359]
 68. At the present time Student still whines and cries at times but it is very inconsistent and has decreased. Behavioral concerns come up a few times a week and behavior does not escalate as it had in the past. [NT 359-360]

69. As of the time of the FBA completed for purposes of the October evaluation, the following additional plans initially made in August had been implemented: allow Student time and space to improve ability to reengage in academics once escalation has begun; establishment of a quiet cool-off space; discussing the problem and solutions with guidance counselor, IST teacher, or other supportive staff; removal from classroom if behavior is disruptive in order to cool down and discuss with adult [guidance counselor, IST teacher, principal if more serious]; if taken to principal call to parents and then return to class; pick-up by parents during severe and persistent escalations. [NT 106-107; S-9]
70. Systematic behavioral observation and recording of data was done over three interval periods. [NT 117-126; P-14]
71. Data targeted the following categories: Response to teacher/Lesson, Peer interaction, Works on school subjects, Transition movements, Inappropriate movement, Inattention, Inappropriate vocalization, Repetitive motor movements, Aggression. [P-14]
72. Data was recorded for nine periods of the day [homeroom, communications, Kidwriting, math, lunch, related arts, recess, center instructions and science/social studies] on a scale from “5” [no prompts or supports given] to “1” [seven or more prompts given, little compliance]. A rating of “0” was given when Student was removed from the classroom because of unmanageable behavior. “No rating” was assigned when Student was not in school for any reason, but often absence was due to extensions of difficulties in the classroom. [P-14]
73. Rating totals for the nine periods of the day are presented below. The three Data Sets are 9-8-10 to 9-30-10, 10-4-10 to 10-25-10, and 10-26-10 to 11-10-10. By the third Data Set, Student was rarely at a rating below “3” [three or four prompts given, compliance with most demands], was substantially often at “4” [one or two prompts given, compliance with demands], removals from the classroom [“0”] were reduced from 18% to 6%, and removals from the school building [“no rating”] were reduced from 47% to 5%. [NT 137-138; P-14]

Data Set	5	4	3	2	1	0	No Rating
One	16%	28%	6%	4%	2%	18%	47%
Two	18%	30%	11%	12%	6%	5%	45%
Three	15%	52%	19%	1%	2%	6%	5%

74. Systematic behavioral observation and recording of data indicated that from September 9, 2010 to November 10, 2010 the amount of time Student was removed or had to leave the classroom for a substantial period of time [15 minutes or more] due to disruptive behavior or inability to cope with the demands of the situation was substantially reduced. [P-14]

75. In the absence of current special education services, Student is making progress in the regular education classroom setting with supports in the opinion of the mother, the guidance counselor, the kindergarten teacher, the educational consultant and the special education supervisor. [NT 143-144, 204, 319, 328, 348-349, 358-360, 372-373]
76. Student is currently in a supportive school building with an excellent teacher in a class of fourteen students. [NT 205-206, 273]
77. Student and the family are about to begin individual and family therapy, and the physician will review Student's need for medication. [NT 333-334]

Discussion and Conclusions of Law

Our United States Supreme Court has held that in an administrative hearing brought under the IDEA the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). Thus, the party bearing the burden of persuasion, in this case the Parents, must prove its case by a preponderance of the evidence. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, the burden of persuasion under Schaffer only comes into play when neither party introduces a preponderance of the evidence. In that event, evidence is evenly balanced, or in "equipoise" as the Court put it, and the party having the burden of persuasion failed to tip the evidence scale in its favor and thus cannot prevail. The evidence was not in equipoise on any of the issues, the Parents having produced a preponderance of evidence on all areas of dispute.

During a due process hearing the hearing officer has the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. 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). Credibility issues, as they affect the outcome of the case, are incorporated below.

Child Find: Did the School District deny Student a free appropriate public education through failing in its child find obligation?

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) which took effect on July 1, 2005. 20 U.S.C. § 1400 *et seq.* The IDEIA sets forth the responsibilities (commonly referenced as "child find" responsibilities) borne by school districts for identifying which children residing in its boundaries are in need of special education and related services such that "[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated..." 20 U.S.C. §1412(a)(3). Parents do not have a duty to identify, locate, or evaluate their child pursuant to IDEA. This obligation falls squarely upon the district. *Hicks, ex rel. Hicks v. Purchase Line School Dist.* 251 F.Supp.2d

1250, 1253 (W.D.Pa., 2003), citing, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.1996).

Prior to entry into the District, Student received Early Intervention services. [FF 1] When the District evaluated Student in the summer of 2010 in preparation for transition to school-age programming it had a wealth of information at its disposal supporting a finding of eligibility for special education services. Input from the Parents regarding Student's aggressive behaviors in preschool, information from two previous preschool IEPs, and particularly input from the Student's teachers in written form [academically below average, not able to manage anger, not being able to function in a large group setting, having difficulty explaining how Student feels making anger management harder, getting upset easily then swinging at other children, dealing with emotions by lashing out at everything and everyone around Student, and not adapting well to change] and in responses to standardized questionnaires all suggested that Student presented with significant behavioral challenges. [FF 4, 6, 7, 15, 16, 17] Moreover, Student's Bracken results, difficulty with certain areas of the WPPSI-III, and poor performance on the Beery VMI supported the presence of interference with learning. [FF 9, 10, 12, 13, 14]

There was scant data upon which to rest a finding of ineligibility. The learning consultant's testimony on this issue was given very little weight as she seemed solely focused on whether Student was ready for kindergarten based on the Bracken School Readiness score, particularly rote academics (numbers, letters, colors), and granted little importance to Student's significant areas of weakness that included receptive skills needed to take in new information and integrate it into new situations. [FF 10] The District psychologist, who was primarily responsible for the evaluation, discarded the appraisal of two preschool teachers who interacted with Student on a daily basis the previous year, seemingly based on his conclusion from talking with the mother that the teachers had set Student up or that there was a problem between the teachers and the mother. [FF 8] Although he presented as answering questions very carefully and considering his answers in order to be exact, the District psychologist's testimony was credited with little weight relative to the issue of identification. He consistently claimed to have considered various pieces of concurrent data that would have led to a finding of eligibility but consistently discarded these data for reasons that were not adequately explained in the record or in the evaluation. Furthermore, when asked to explain his process for sorting out the difference between a diagnosis and an eligibility classification he was hard-pressed to do so ["It's hard to quantify the difference between a diagnosis and say eligibility, but I do consider it a difference."] Given that a large part of his responsibility is to classify children with disabilities, his difficulty on this point was striking.

The District abdicated responsibility for a comprehensive evaluation when, recognizing that Student may have a neurologically-based disorder affecting attention and behavior, it intimated that the Parents might wish to pursue further assessment. [FF 21]

The Parents' refusal to allow the District to observe Student in preschool was not in the Student's best interest, although the mother's reason clearly was not malicious but rather

protective and indicative of hope for better behavior in a new environment with a fresh start. [FF 8] Even though the District did not have the opportunity to observe Student directly, given the preschool teachers' reports and mother's reasons for not allowing an observation it would have been a reasonable assumption that acting out behavior would have been seen. Given the quality of information provided by the preschool teachers, it is ironic that the District psychologist testified to being "substantially surprised" at Student's behavior the first day of school because he had "not anticipated that [Student's] behavior had been anywhere near that level from the information provided".

Unfortunately, Student made Student's special education needs known from the first day in kindergarten, [FF 25, 28, 29] presenting with behaviors so extreme that school staff met to plan interventions on the second day of school [FF 26] and a week later issued another PTE, going so far as to drive the document to mother's workplace to obtain her signature. [FF 27]

The District's child find failure was almost immediately remedied, and Student suffered no educational harm except in the area of occupational therapy, as will be discussed below. Therefore no compensatory education is due.

IEP: Did the School District deny Student a free appropriate public education by proffering an IEP that is inappropriate in the areas of present educational levels, goals, specially designed instruction, behavior support, social skills support, and occupational therapy support?

Having been found eligible for special education, Student is entitled by federal law under IDEIA, and by state law under the 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).

'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. 34 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

Several months ago, when deciding *Breanne C. v. Southern York County School District*, 2010 WL 3191851, M.D. Pa, Aug 11, 2010 the federal district court for the Middle Region noted that when an eligible child receives an IEP, that IEP must be reasonably calculated to afford the child the opportunity to receive a "meaningful educational

benefit” [*Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) ; *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir.1999)] and that an IEP confers a meaningful educational benefit when it is more than a trivial attempt at meeting the educational needs of the student, and it is designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social and emotional.

As discussed in both the August 26th and the October 1st evaluation reports, Student presents with a variety of needs including behavioral control and emotional regulation, social skills (understanding social cues and knowing how to form positive relationships with peers), and visual-fine motor coordination and integration. The IEPs presented to the Parents were inappropriate along several dimensions, including LRE which will be addressed later in this decision.

The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals...related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children... CFR §300.347(a)(1) through (4)

Each IEP offered to Student presented two goals in the area of behavioral control and emotional regulation [FF 40, 50] but neither provided annual measurable goals in the area of verbal and physical aggression which was of significant concern in Student’s presentation. [FF 46, 47] The reasons behind the District’s discarding the two behavioral goals in the October IEP and substituting two other goals in the November IEP were not logically explained in the IEP meetings or in the hearing.

Neither IEP provided goals to address the delays revealed in the Bracken testing, perhaps because the educational consultant believed that Student’s being in the Delayed Range in four of six Bracken categories was “not a concern” because academic readiness was intact. [FF 43]

Neither IEP carried annual measurable goals in the area of social skills acquisition. [FF 44, 45] Evidence that the courts hold that schools are responsible for teaching social skills is apparent. The Third Circuit articulated its position that education is more than academics and involves emotional and social progress in its holding that an IEP is appropriate if it offers meaningful progress in *all relevant domains under the IDEA* (emphasis added). *M.C. v. Central Regional S. D.*, 81 F.3d 389 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996). In the instant matter the testimony of the educational consultant was troubling in that she minimized the importance of annual measurable goals,

maintaining that they were not necessary if they were contained in the behavior support plan or the SDI. [FF 42] Rather, annual measurable goals are the heart of the IEP – students receive specially designed instruction to remediate an area of need, and in order to determine if the interventions are appropriate progress measuring/monitoring is necessary. Progress cannot be measured without a beginning point and an ending point. Teachers need to see how a child is moving toward a goal in order to know whether to continue or to modify instruction and parents need to be given concrete information about their child's progress toward goals so that they can participate in the educational planning process. The educational consultant's testimony was given little weight.

Although Student demonstrates significant difficulties in the areas of motor planning skills, hand manipulation, motor coordination, tool skills and handwriting development the October 12th IEP does not have any annual measurable occupational therapy goals to address these deficits, [FF 48] although this deficiency was corrected in the November 19th IEP. [FF 54, 55]

Neither IEP provides individual counseling as a supportive service for Student, [FF 56] in spite of Student's demonstrating that Student profits from one-to-one support from an adult with whom to work through frustrations. [FF 67]

The District's IEPs were inappropriate, but neither was implemented [FF 37, 38, 39] and Student made meaningful educational progress in regular education with supports. [FF 66] Although guidance counseling should be made a part of the new IEP on at least a twice-per week basis as well as on an as-needed basis, Student's frequent interactions with the guidance counselor during the first half of the year provided FAPE in this area. Therefore no compensatory education is due in the area of inappropriate IEPs except for the area of occupational therapy. The District will be ordered to convene an IEP meeting and create an IEP that carries measurable annual goals and supportive services in the areas identified above. If the parties wish, assistance in drafting an appropriate IEP can be obtained from the Office for Dispute Resolution in the form of an IEP facilitator.

Student received Occupational Therapy services the previous year in preschool. Student demonstrated visual-grapho-motor weaknesses in the August 26th evaluation, and the OT portion of the October 1st evaluation determined that Student requires 30 minutes of direct OT per week. [FF 14, 34] The District's initial inappropriate finding of ineligibility, and subsequent offer of inappropriate programming and placement once Student was found eligible, resulted in Student's not receiving OT services this school year. As Student was denied OT services, Student is entitled to compensatory education in the form of 30 minutes per week of direct OT for the period from August 30th until a new IEP is implemented. This compensatory service must be in addition to the OT sessions provided under the IEP, and may take the form of discrete additional 30-minute sessions or used by adding minutes to already scheduled sessions in blocks of 10 or 15 minutes until the time is made up. The decision about how to arrange these compensatory services should be made by the occupational therapist in consultation with the Parents with input from the kindergarten teacher in terms of Student's classroom schedule.

LRE: Did the School District deny Student a free appropriate public education by not proposing the least restrictive environment for Student, or alternatively not providing an appropriate transition plan if Student was to be moved from the present environment to a more restrictive environment?

In a seminal case, the Third Circuit considered that “[L]earning to associate, communicate and cooperate with nondisabled persons is essential to the personal independence of children with disabilities. The Act’s mainstreaming directive stems from Congress’s concern that the states, through public education, work to develop such independence for disabled children.” *Oberti v. Board of Education of Clementon Sch. Dist.*, 995 F.2d 1204, 19 IDELR 908 (3d Cir. 1993). Nearly a decade later, the Third Circuit continued to offer guidance on this matter when in *Girty v. School Dist. of Valley Grove*, 163 F. Supp. 2d 527, (W.D.Pa. 2001), aff’d 60 Fed. Appx. 889, 175 Ed. Law Rep. 408 (3d Cir. 2002) the court, citing *Oberti*, noted that development of social skills must be considered as one educational benefit when comparing regular education and non-inclusive settings when determining least restrictive environment.

Pursuant to the October 1st evaluation, in the October 12th IEP the District proposed placing Student in an emotional support classroom for 73% of the school day. [FF 37] The District presented no evidence to suggest that it gave consideration to maintaining Student in a regular education setting with appropriate supports and services. In response to the Parents’ concerns about the restrictiveness of the proposed placement, the District proposed another IEP dated November 19th under which Student would be excluded from regular education for 48% of the time each day. [FF 38] Despite Student’s significant improvement in the regular education setting using the successful supports provided at the home school, there was no evidence that the District considered keeping Student in that setting. The Parents are not opposed to their child’s receiving special education services, but they are rightfully concerned about ensuring Student’s rights to the least restrictive environment appropriate for Student. [FF 39] Both the October 12th and the November 19th IEPs were inappropriate in the area of LRE.

Student’s behavioral issues were so extreme starting with the first day of kindergarten that the District quickly met and planned a variety of regular education interventions that they immediately carried out. The interventions were three-dimensional: behavioral, academic, and home-school cooperation. [FF 58, 59, 60] For a period of time a classroom aide was assigned to Student [FF 61], and Student participated in whole-class guidance groups with kindergarten peers. [FF 62] These interventions were successful as attested to by every witness including the District psychologist, the educational consultant, the special education supervisor, and the mother. Most importantly, Student’s guidance counselor and kindergarten teacher, the two individuals who are particularly qualified by education and experience to render an opinion about Student’s actual day-to-day functioning in school, and who have worked most closely with Student, testified very credibly to significant progress between the beginning of the school year in late August and mid-December when the hearing was held. [FF 63, 65, 66] Their testimony was given a great deal of weight. Although they acknowledge that Student continues to struggle with frustration, Student is more able to talk through difficulties with an adult

and Student's behavior problems are neither as frequent nor as intense as they had been. [FF 67, 68] In the guidance group Student can attend, interact positively, model the good behaviors of other children in the group, and get something from the group. Student can complete the task assigned, listen to a story, and participate fully in different activities. [FF 64] Student can negotiate the less structured cafeteria setting unassisted. [FF 65] Student is keeping pace with kindergarten peers academically. Student trusts school staff, and school staff has successfully maintained Student in regular education with supports, even without the underpinning of an IEP. [[69, 75]

Evidence of Student's progress in the regular education kindergarten classroom was not only recounted anecdotally during testimony, but systematic data collection along key behavioral dimensions across Student's day reflected significant behavioral progress in two and a half months. [FF 70, 71, 72, 73, 74] The District psychologist's testimony was very helpful in explaining the methodology of the data collection and assisting with an understanding of its interpretation.

Although Student is in a regular education kindergarten and, as there is no approved NOREP, is not yet receiving "special education", it is evident that the District staff has designed and implemented a rich support system that as carried out looks very much like an IEP [FF 69] and has yielded the results that one would want to see in an appropriate and effective IEP. Although Student has the presumptive right to be in a regular education setting [that is, Student does not have to prove that Student can be included in a regular education setting] Student in fact has demonstrated the ability to function adequately in a regular education classroom with appropriate supports and services. Student's behavioral progress has been remarkable given reports from preschool and Student's early presentation in the District, and just as remarkable is Student's having kept pace academically despite having behavioral issues.

There is no question that Student must stay in the regular education environment, with a continuation of the current supports fully articulated in an IEP that contains measurable annual goals in salient areas of need. This hearing officer holds that Student's least restrictive appropriate environment at the present time is the regular education classroom with no removal to a special education classroom for any part of the day. Special education supports should be provided within the regular education environment to address the needs identified in the psychoeducational, speech/language, occupational therapy, behavioral and psychiatric evaluations, with adjustments commensurate with progress to date.

Given that Student has made meaningful educational progress in regular education thus far with intensive supportive services, it is anticipated that Student will continue to make meaningful progress with a strong IEP in place, with the District and the Parents no longer in litigation, with individual and family outpatient therapy and with medication to address ADHD and other behavioral/mental health issues.

Because Student has derived meaningful educational benefit from entrance into kindergarten until the present, albeit without a formal IEP in place, Student has suffered

no educational harm due to the supports offered in regular education, and Student therefore is not entitled to compensatory education on the basis of LRE.

Order

It is hereby ordered that:

1. The School District did initially fail in its child find obligation, but quickly corrected its error within an appropriate time frame such that Student was not denied FAPE, and no compensatory education is due except in the area of occupational therapy.
2. The School District did proffer two IEPs that were not appropriate but those IEPs were never implemented. Therefore Student was not denied FAPE and no compensatory education is due, except in the area of occupational therapy.
3. The School District did not propose a placement in the least restrictive environment for Student. However, Student remained in the regular education setting with sufficient supports such that Student made meaningful educational progress academically and behaviorally, and therefore there was no denial of FAPE in this regard and no compensatory education is due.
4. The least restrictive environment appropriate for Student at this time is the regular education classroom with special education supports and services. Student may not be placed in a special education classroom for any portion of the school day unless the parties mutually decide otherwise.
5. Within fifteen calendar days of receiving this decision the District must reconvene the IEP team and craft an IEP consistent with the discussion above.
6. As Student was denied occupational therapy services, Student is entitled to compensatory education in the form of 30 minutes per week of direct OT for the period from August 30th until a new IEP is implemented. This compensatory education must be in addition to the OT sessions provided under the IEP, and may take the form of discrete additional 30-minute sessions, or be provided by adding minutes to already scheduled sessions in blocks of 10 or 15 minutes until the time is made up.

Any claims not specifically addressed by this decision and order are denied and dismissed.

January 18, 2011
Date

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