

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: I.W.

ODR #13158/12-13-AS

Date of Birth:
[redacted]

Dates of Hearing:
October 16, 2012
October 19, 2012

CLOSED HEARING

Parties to the Hearing:

Parent

Representative:

Elizabeth Morgan, Esquire
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Media, PA 19063

Judith Gran, Esquire
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Penn-Delco School District
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Gabrielle Sereni, Esquire
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Date Record Closed:

October 23, 2012

Date of Decision:

October 29, 2012

Hearing Officer:

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

Background

Student¹ is a kindergarten pupil attending a District elementary school. Student has a disabling genetic syndrome and is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the classification of Intellectual Disability, and consequently is a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504].

Student began the year in a general education classroom, but due to its having determined that Student had injured other kindergarten students, on or about September 27, 2012 the District removed Student from the general education classroom to a separate classroom in which Student is the only pupil, attended by two adults. On October 8, 2012 the Parent filed a Motion to Enforce Pendency, and on October 11, 2012 the District filed this due process request after instituting the unilateral removal pursuant to provisions of the IDEA and its determination that Student should be placed into an Interim Alternative Educational Setting [IAES] for a period of 45 school days.

Another due process case concerning Student had been filed by the Parent prior to the District's filing at issue in this decision and the first session in that matter was held on September 21, 2012. That case is ongoing and concerns a dispute about the appropriate educational placement for Student. That case was set aside in favor of conducting the current expedited hearing, and is scheduled to resume on November 2, 2012.

Issue

May the District remove Student from the half-day general education setting and place Student in an IAES, specifically the full-day MDS classroom, for a period of 45 days?

Findings of Fact

1. Student is eligible for special education under the IDEA, having been classified as having an intellectual disability. Student can perform many life skills, such as setting the table, cleaning, dressing, tooth-brushing, and hair-brushing independently. At home Student basically does what is asked, although Student says "no" a lot, starting about two and a half years ago, although behaviors improved somewhat with a change in medication. [NT 383-385²; S-1]
2. Student currently is prescribed Adderall and Kapvay, and Student is given the medications daily including weekends. [NT 409-411]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² Unless otherwise specified, the page numbers in this decision refer to Volumes I and II of the transcripts taken on the October 16th and October 19th hearing sessions for case #13158. The other case, #3253, also has a Volume I and will have a Volume II.

3. Recently Student has been able to verbalize feeling angry to [Student's] mother. [NT 385]
4. The Parent's expert testified that over the past five years new research is indicating that many children with Student's genetic disorder also have a diagnosis of Autism Spectrum Disorder and that these children do not seem to respond to the same kinds of behavioral approaches that are appropriate for children with only one of the two diagnoses. [NT 55, 89]
5. Student received Early Intervention [EI] services at the Intermediate Unit [IU] beginning at age three and although Student was age-eligible for kindergarten in the 2010-2011 school year, the Parent exercised her right to continue EI for an additional year. A Reevaluation Report issued by the IU on October 27, 2011 notes that in EI Student exhibited aggressive behaviors [toward] adults and peers. [S-2]
6. An IFSP/IEP of December 7, 2011 notes Student's behavior still included [aggression toward] adults and peers. [S-3]
7. The December 7, 2011 IFSP/IEP recommended adult supervision to "prevent acting out" and also notes that Student preferred "adult interaction" to the "less predictable reactions of peers" such that Student will "ignore" peers or "act to repel them." [S-3]
8. The expert engaged by the Parent noted that the IU preschool classroom, which was a "reverse mainstream"³ classroom was "a very good daycare" where few academic demands were placed on Student. Parent's expert observed Student interacting appropriately with other children on the day he observed. [NT 63]
9. On May 29, 2012, the District issued a NOREP recommending placement in the District's Multiple Disabilities Support [MDS] class. The Parent disagreed with this recommendation. [S-4]
10. At a Resolution Meeting on August 30, 2012 the parties discussed pendency as the District does not have a reverse mainstreaming classroom. Ultimately, as a due process hearing was scheduled⁴ and the parties intended to hold an IEP meeting, the District

³ In contrast to "mainstreaming" or "inclusion" in which a special education [disabled] student is placed in a general education classroom with nondisabled students, "reverse mainstreaming" involves placing general education [nondisabled] students in a special education classroom with disabled students.

⁴ In October the Parent filed a Motion to uphold pendency and the Hearing Officer determined that an evidentiary hearing was needed on this subject, particularly since a hearing date a few days hence had been established. The topic of pendency in that session was preempted because the expedited filing intervened. Had the question of pendency been directly before me in August 2012, I would have ruled that Student's pendent placement was a special education classroom, since the IU reverse mainstream placement was a special education classroom with general education children included in it. However, on September 17, 2012, in order "to amicably resolve the family's Administrative Complaint" the District issued a NOREP for a general education half day kindergarten class with supplemental supports and services. The Parent approved that NOREP, thus making a general education half-day kindergarten classroom the "last agreed-upon" placement and therefore the pendent placement. [S-5]

acquiesced to the Parent's assertion that pendency was a general education classroom, and placed Student in one of the building's general education half-day kindergarten classes. The District also honored the Parent's refusal to have Student attend the MDS class for the other half of the day when Student was not in the general education classroom.⁵ [S-5]

11. Despite its honoring the Parent's wishes, the District continued to believe that a full-day placement in the MDS special education classroom was the appropriate placement for Student. [NT 108-110]
12. Prior to Student's entry into kindergarten the District's Director of Special Education [DSE], who is also a Board Certified Behavior Analyst at the doctoral level [BCBAD] [hereinafter DSE/BCBAD] and whose doctoral dissertation was on the subject of Inclusion, met with the general education teacher who was receiving Student into her classroom and with the special education teacher who would be providing itinerant services. [NT 117-118]
13. Student began attending half-day kindergarten in a general education classroom in one of the District's elementary schools on September 5, 2012. The class has twenty-five children including Student. The classroom has a teacher and an aide. [NT 154]
14. The general education kindergarten teacher made adaptations to the general education curriculum for Student. A certified special education teacher who is completing Board Certified Behavior Analyst [BCBA] certification provided Student with itinerant level special education services.
15. Student received related services in the form of speech/language therapy [S/L], occupational therapy [OT] and physical therapy [PT].
16. Student originally had a one-to-one Personal Care Assistant [PCA] on the bus and during school hours, but virtually from the beginning of the school year it became clear that Student required a one-to-one with a higher level of training. The District worked through staffing agencies and after about three weeks was able to secure a Therapeutic Staff Support [TSS] worker.⁶ [NT 331-336]
17. The DSE/BCBAD was with Student every day for 95 percent of the day during the first two weeks of school. The DSE/BCBAD collected data on Student's behaviors, while

⁵ On October 11, 2012 in light of Student's aggressive behaviors the District issued a NOREP for the MDS class. [S-9]

⁶ An additional but not determinative reason for replacing the PCA was that the individual assigned through a staffing agency, although warm and able to establish good rapport with the Student and the Parent, could not provide the language modeling Student requires. [NT 328] The individual testified at the hearing, and is noted to speak very heavily accented English, with some errors including personal pronoun gender confusion and subject-verb agreement; at times the witness did not understand the questions asked and required rephrasing. It was necessary for the hearing officer and the court reporter to review the tape of portions of the testimony to ensure an accurate and true transcript.

personally serving in a one-to-one capacity with Student in the general education classroom almost every school day⁷. [NT 119]

18. After several days of direct observation, as of September 12, 2012 the DSE/BCBAD in concert with the general education teacher and the special education teacher who is working toward BCBA certification developed and implemented a Behavior Plan, based upon a Functional Behavior Assessment. [NT 113, 120; S-7, S-8]
19. The Behavior Plan included behavioral strategies such as pairing with the staff member[s] who would be making the most demands on Student while pairing the one-to-one person with Student for preferred tasks, identifying reinforcers with parental input, reducing demands in the classroom, proximity, cuing, prompting, scripting, redirection, and other interventions aimed at increasing functional communication in order to decrease maladaptive behavior. [NT 120]
20. On the first day of school, September 5, 2012 in the general education classroom with the DSE/BCBAD next to Student, the classroom aide across from Student and the general education teacher in front of the room, Student [acted aggressively toward another child]. The child cried and was quite upset. [NT 126-128; P-3]
21. The DSE/BCBAD noted that even though there were three adults in the room Student was too quick to be intercepted by any of them. [NT 131]
22. The DSE/BCBAD noted that this incident happened on the first day of school when kindergartners tend to be apprehensive and that the incident frightened the children. [NT 136]
23. The DSE/BCBAD pulled Student away from the other child, removed Student from the room and practiced compliance drills [i.e. “quiet hands”]. During this time Student was aggressive towards her [redacted] but eventually was able to calm down through the compliance drills without needing any physical restraint [for example, a “basket hold”]. [NT 131-135]
24. During the time the DSE/BCBAD was helping Student gain behavioral control Student kept repeating “home, home, home” and when the principal called the Parent Student smiled. [NT 203-205]
25. On the second day of school, September 6, 2012 Student was accompanied by the PCA with whom, according to the Parent, Student seemed to have established quick rapport. The PCA testified that Student was taking [items] and throwing them a lot that day. [NT 397]
26. On September 7, 2012 Student was in the sensory room looking at comic books prior to beginning physical therapy. Student’s physical therapist and Student’s PCA were in the

⁷ The level of investment the District made to address Student’s behaviors and promote Student’s success is illustrated by the fact that the DSE/BCBAD is the District’s only Special Education Director.

room, with Student's PCA being about 9 feet away from Student. One other child was in the sensory room, working on a computer with his back turned to Student and his own PCA at his side. Student [acted aggressively toward the other child]. Student needed physical prompting to [stop that behavior]. [NT 270, 366, 368; P-3]

27. On or about September 19, 2012 another child in the general education classroom reported that Student had been [engaging in problematic behavior] throughout the day. Although the PCA testified that he did not see Student [engage in that behavior toward the other] child, he said that Student did [engage in that behavior toward] him [PCA] often but did say "sorry". [NT 139, 144, 273; P-3]
28. On September 20, 2012 while in the general education classroom, Student again [acted aggressively toward another child]. [NT 144; P-3]
29. On September 21, 2012 in the sensory room Student [acted aggressively toward] another child. The witnesses provided conflicting testimony as to whether the PCA was present at the time or not, but there was at least one other adult in the room with Student. [NT 280, 282, 445]
30. On September 26, 2012 an incident occurred while the Parent's expert was observing in the general education classroom. Student slumped down from Student's chair, and leapt over the DSE/BCBAD [and began to act aggressively toward another child]. [NT 160]
31. Student was removed immediately and during compliance drills ["quiet hands"] became aggressive towards the DSE/BCBAD including [redacted]. Once Student calmed down the Parent's expert was able to take Student to get a drink of water. Student seemed remorseful. [NT 32, 48, 160]
32. On October 9, 2012 while Student was waiting to use the restroom in the nurse's office Student [acted aggressively] toward another child who emerged from behind a screen. An adult blocked Student from reaching the other child, but Student managed to [injure] the other child. [NT 164-165]
33. On October 18, 2012 Student's teacher and the principal were staying with Student and holding Student's hand while the TSS briefly used the restroom. Student repeatedly verbalized "pockets" so the principal released Student's hand and Student's hands went into Student's pockets. Suddenly, yelling "hit, hit", Student [acted aggressively] toward another child who was in an adjoining area with his back to Student. The principal was able to intercept Student so the other child was not touched. [NT 452-454; S-13]
34. As Student, the teacher and the principal resumed standing together, Student again said "hit" and [acted aggressively toward] the principal [redacted]. [NT 454-455; S-13]
35. On October 19, 2012 Student [acted aggressively toward a] teacher [redacted]. When redirected again Student threw a puzzle. [S-14]

36. The PCA testified that Student liked to take [items] and throw them, that Student often swept books and materials off tables onto the floor, that Student walked “with a swinging gait” and that Student would hit the DSE/BCBAD. He also testified that he saw Student [act aggressively toward] another child twice, and that [Student acted aggressively toward] him [PCA]. [NT 286-287, 304, 310]
37. Although only the most severe incidents were highlighted in testimony, the DSE/BCBAD testified that “it was at least a hundred times” that she prevented Student [acting aggressively toward] another child. Even though the DSE/BCBAD had spent a significant amount of time with Student on a daily basis, and has witnessed/intercepted many aggressive attempts, she is still unable to identify antecedents or triggers to Student’s aggression which arises spontaneously and without warning. [NT 147, 151, 238; S-11, P-3, P-4, P-5]
38. Student’s aggressive incidents occur across settings, when in the large group of children or when with only one other child. Incidents have also occurred when just adults were present. [NT 214]
39. The District proposes the full day MDS class in Student’s current elementary school building as the IAES. The class has two other students who are the children with whom Student rides the bus to school.⁸ The class will have at least a 3-3 adult-teacher ratio, fewer distractions, and more opportunity for one-on-one instruction. The teacher who is completing her BCBA certification and is now on maternity leave has written the lesson plans for the class based on Verbal Behavior strategies. In the MDS class Student will continue to receive one-to-one TSS services, and will continue to have the related services of S/L, OT and PT. The District believes that the MDS class is an appropriate setting in which to work on increasing functional communication in order to decrease maladaptive behavior as the classroom utilizes a Verbal-Behavior approach.⁹ The District maintains that the MDS class will allow staff to gain instructional control so that Student can access the curriculum and behavioral control so that Student can be reintegrated into general education as appropriate. [NT 154]
40. The Parent’s expert believes that Student can appropriately be educated in a general education kindergarten somewhere in the District, but not the classroom originally assigned. [NT 74]
41. The Parent’s expert believes that Student requires full-day programming if designed in the right way and supported in the right way, but that the question is the type of support Student will need, and while he is not a proponent of 1:1 staff support for the purposes of inclusion, for the present a 1:1 support staff with whom Student would build a relationship to bridge to other relationships would be helpful. [NT 75, 80]

⁸ On several occasions Student has attempted to follow these two peers into the MDS class when entering the school building.

⁹ This opinion is consistent with the testimony of the Supervisor of Special Education in her testimony in the related matter of ODR # 3253/12-13-AS on transcript pages 128-130.

Legal Basis

Burden of Proof:

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in “equipoise,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the District requested this hearing and was therefore assigned the burden of persuasion pursuant to *Schaffer*, and in this matter the District also accepted the burden of production even though case law does not clearly assign same to either party. As the District’s evidence was preponderant the *Schaffer* rule did not need to be applied.

Credibility:

During a due process hearing the hearing officer is charged with 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); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

Each witness who testified in this matter was deemed to have testified candidly and none appeared to be coloring his/her testimony to fit the purposes of the party with which they were aligned. The District presented the testimony of the District’s Director of Special Education who is also a doctoral level Board Certified Behavior Analyst; the District’s Supervisor of Special Education; the Parent’s expert; the elementary school Principal; and Student’s Certified Special Education Teacher. The Parent presented Student’s former PCA as a witness, and also testified herself. The testimony of the District’s staff about the frequency, speed and severity of Student’s aggressive behavior was given considerable weight as these witnesses individually and as a group have had daily contact with Student over a six-week period and have observed Student’s behaviors first-hand. Their testimony about the speed and severity of Student’s aggressive acts was supported by the Parent’s expert who witnessed one of Student’s aggressive incidents and the subsequent efforts to help Student establish control. Although the Parent’s expert likely has a great deal to offer the IEP team as it plans Student’s reintroduction into general education for part of all the day following an IAES placement, his opinion that general education is the appropriate placement for Student right now was outweighed by evidence that Student presents a substantial risk of injury to others at this time. The former PCA’s testimony further supported the District’s case relative to frequency and speed of Student’s behaviors. The Parent is clearly an ardent advocate for her child, but as she could not offer direct observations about Student’s behavior in school her testimony could not outweigh the evidence provided by the other witnesses. The Parent’s aspirations for her child to read and to attend college are clear and more

likely than not will be realized once Student has gained behavioral control and thus be accessible for academic learning.

Special Education:

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amended the Individuals with Disabilities Education Act. 20 U.S.C. §§ 1400 *et seq.* [see also 22 Pa. Code §§ 14.101 *et seq.*] Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a “free appropriate public education” [FAPE]. 20 U.S.C. § 1412(a)(1), 20 U.S.C. § 1401(9). The child's identified needs, not the child's disability category, determine the services that must be provided to the child. *Maine Sch Administrative Dist No 56 v. Ms W ex rel KS* 47 IDELR 219 (D. Maine 2007). A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996). “Meaningful benefit” means that an eligible student’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999).

The IDEA through its implementing regulations properly places prominent value on the role of parents in the education of their children. Each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. 34 CFR §300.327; 34 CFR §300.501(c).

IDEA provides that school personnel may remove a student to an interim alternative educational setting (IAES) for no more than 45 school days under certain “special circumstances,” without regard to whether the behavior is a manifestation of the student’s disability, including when the student “has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function, under the jurisdiction of a State or local educational agency.” 20 U.S.C. 1415 (k)(1)(G)(iii); 34 C.F.R. 300.530 (g)(3). IDEA adopts the definition of “serious bodily injury” from 18 U.S.C. 1365 (h)(3), which definition includes “extreme physical pain.” See, 34 C.F.R. 300.530 (i)(3).

However, once a District has made the decision that a 45 day IAES is needed, and there is a disagreement about the 45-day placement, the IDEA’s implementing regulations provide that a District may request an expedited hearing if it believes that maintaining the current placement of a student is “substantially likely to result in injury¹⁰ to the child or others.” 20 U.S.C. 1415 (k)(3)(A); 34 C.F.R. 300.532 (a). The IDEA specifically authorizes a hearing officer to order a change of placement to a 45 day IAES if the hearing officer determines that maintaining the current placement of the child is “substantially likely to result in injury to the child or to others.” 20 U.S.C. Section 1415 (k)(3)(B)(ii)(II); 34 C.F.R. 300.532 (b)(2)(ii).

¹⁰ The issue for the hearing officer to determine is whether “injury” [not, according to the language of the statute and regulations, “serious bodily injury”] is substantially likely to result if the student is maintained in the current placement.

The District produced a preponderance of credible evidence that on numerous occasions from September 5, 2012 through October 19, 2012, Student engaged in severe aggressive behaviors toward other children and adults. [Redacted.] Student's aggression seems unprovoked by external circumstances, and is executed rapidly. At times Student requires intensive behavioral compliance drills which eventually succeed in restoring calm after initial resistance. Making the danger of injury even more likely, the DSE/BCBAD to date has not been able to discern antecedents or triggers to these behaviors in spite of spending considerable amounts of time directly with Student.

An additional consideration must be the acknowledgement that Student's behavior has been quite frightening to the children who were attacked, as well as to the other five and six year olds in the general education classroom who are just beginning their school experience. These young children are particularly physically and emotionally vulnerable and at risk of forming a negative first impression of school. Unlike children even just a few years older, these kindergartners are unlikely to have the mental development¹¹ necessary to take another's viewpoint and to accept significant differences. As even the Parent's expert acknowledged, it would not be appropriate for Student to continue in the previous general education classroom.

While inclusion in a general education setting with appropriate supports and services is the default placement to which Student is entitled, at this time Student requires and deserves the opportunity to be helped to establish impulse control in the school setting. The evidence is persuasive that Student's current behavior is substantially likely to cause injury to others. The small MDS classroom, with two children with whom Student rides the bus and is familiar, offers a highly staffed setting employing a Verbal-Behavior approach. Additionally, keeping Student in the current elementary school offers continuity and eliminates the need for a transition in transportation and location, and will facilitate gradual reintroduction into the general education environment as instructional control is established.

¹¹ See for example the work of Jean Piaget on the cognitive development of children.

Order

It is hereby ordered that:

1. The District may change Student's placement for a period of 45 school days based on its determination that maintaining the Student's last agreed-upon placement is substantially likely to result in injury to the child or others.
2. The Multiple Disabilities Support class may serve as the IAES for the 45 school day period.

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

October 29, 2012

Date

Linda M. Valentini, Psy.D., CHO

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