

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 14070-1213 AS

Child's Name: A.F.

Date of Birth: [redacted]

Dates of Hearing: 8/12/13, 9/16/13, 9/30/13

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

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Pittsburgh, PA 15211

School District

North Allegheny
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School District Attorney

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Date Record Closed:

October 25, 2013

Date of Decision:

November 15, 2013

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Parents in this case sought a due process hearing primarily because of their dissatisfaction with Student's progress in acquiring and securing academic skills. Parents believe that the District refuses to acknowledge that Student has significant disabilities in addition to the ADHD that supports Student's IDEA eligibility in the OHI category. They further believe that the District has significantly underestimated Student's cognitive ability and believes that Student's minimal academic progress is appropriate. Parents seek increased services to address the full range of Student's needs.

The due process hearing record was completed in three sessions between mid-August and late September. For the reasons explained below, I find in favor of the Parents and will order appropriate relief.

ISSUES

1. Did the School District fail to provide Student with a Free, Appropriate, Public Education (FAPE) in third and fourth grades (2011/2012 and 2012/2013 school years) in that Student did not make meaningful progress in the educational program and placement?
2. Has the School District underestimated Student's cognitive abilities and otherwise failed to properly identify Student's disabilities and disability-related needs and for those reasons failed to provide sufficient academic and supports and services to ensure meaningful educational progress?
3. Should the School District be required to provide Student with compensatory education, and if so, in what amount and in what form?
4. Should the District be required to provide Student with additional services, including a one-to-one aide for academic support, social skills training, additional occupational therapy and additional communication training, speech/language therapy?

FINDINGS OF FACT

Background/Private and District Evaluations

1. Student is an elementary-school-aged child born [redacted] who resides in the North Allegheny School District (District) and is eligible for special education services. (Stipulation, N.T. pp. 11, 12)
2. Although the parties' dispute encompasses the question whether the District has properly identified all applicable disability categories, Student was previously identified as IDEA eligible by reason of Other Health Impairment (OHI) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 11, 12)
3. Until the beginning of the current school year, when Parents began home-schooling, Student was enrolled in a district elementary school and placed in a supplemental learning support class for instruction in reading and math. (N.T. pp. 12 (Stipulation), 273)¹
4. Student has been diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD) by several private psychiatrists. Treatment with various medications had limited success in ameliorating Student's ADHD symptoms over the years, and may have contributed to problems such as irritability and mood changes that affected Student both at home and at school. Although the medication prescribed by Student's current treating psychiatrist has been more successful without significant side effects, it cannot entirely eliminate the effects of ADHD, such as inattentiveness and distractibility, on Student's functioning in school and home settings. (N.T. pp. 27—29, 35, 36)
5. The current psychiatrist, who began treating Student in the spring of 2012, confirmed the ADHD diagnosis, as well as earlier provisional diagnoses of an Autism Spectrum Disorder after seeing Student several times, and after reviewing the criteria for ASD included in the recently released Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5). (N.T. pp. 27, 29, 30, 33, 34, 45, 46, 48)
6. At Parents' request, the District conducted an evaluation of Student in the fall of the 2012/2013 school year (4th grade). All input provided for the evaluation by teachers and other staff noted that Student becomes easily frustrated when tasks are perceived to be difficult and when Student's expectations are not completely met in terms of Student's performance or preferences, such as, *e.g.*, not getting a preferred partner or equipment. The school psychologist who conducted standardized assessments for the evaluation also noted Student's frustration when test items became difficult, although Student exhibited consistent effort during the testing sessions. (S-8 pp. 13, 14, 19)

¹ Although the parties did not submit joint exhibits in this matter, they agreed to use primarily the District exhibits for school records and additional evaluation reports, with a few additions by Parents. That commendable procedure eliminated an unnecessarily long documentary record.

7. Rating scales completed by teachers for the school evaluation indicated that Student has characteristics of ASD. The District's school psychologist was not surprised by the rating scales or the autism diagnosis from the psychiatrist and later by independent school psychologist, since there had been prior discussions between Parents and District staff concerning the possibility of ASD. (N.T. pp. 320—322; S-8 pp. 23, 24)
8. The District school psychologist administered the WJ-III NU COG (Woodcock-Johnson Tests of Cognitive Ability-Third Edition Normative Update) to assess Student's cognitive ability. The General Intellectual Ability (GIA) score was in the below average range at a standard score of 83. The component scores measuring verbal reasoning ability (96), cognitive efficiency (92), processing speed (97) and working memory (95) were all within the average range. Student's score on the visual-spatial reasoning index was at the upper end of the average range at 108. Student's non-verbal reasoning ability (Thinking Ability Index—80) was the only score in the below average range. (N.T. pp. 87, 362; S-8 p. 20)
9. Results of standardized achievement testing on the WJ-III NU-ACH (Woodcock-Johnson Tests of Achievement-Third Edition Normative Update) administered in connection with the District's 2012 reevaluation placed Student in the average range for letter-word identification. Student was in the below average range in reading fluency and passage comprehension. Student's broad reading index score was at the lower end of the average range. (N.T. pp. 352, 353; S-8 p. 22)
10. Student's math achievement on the W-J III was in the average range for math calculation and below average in math fluency, math problem solving and broad math. (S-8 p. 23)
11. Student's scores were in the average range for both spelling and writing samples. (S-8 p. 23)
12. The recommendation section of the District's evaluation incorporated the recommendations made by an independent neuro-psychologist in an evaluation Parents obtained that was completed just before the District's reevaluation. (S-8 pp. 33, 34, S-11 p. 9)
13. In May 2013, Parents obtained a psycho-educational evaluation from an independent certified school psychologist experienced in determining whether students meet IDEA disability criteria for ASD. The school psychologist also concluded that ASD should be added to Student's existing OHI designation as an eligibility category after observing Student for 3 hours in the school setting, as well as during testing and considering rating scales completed by teachers and Parents. The psychologist noted Student's lack of peer interaction, perseverative and self-stimulating behaviors and other sensory issues. (N.T. pp. 51, 52, 54—58, 66—72, 78—81; P-2 pp. 14—17, 26—29)
14. The independent school psychologist and the neuropsychologist who assessed Student in the fall of 2012, both administered the WISC-IV (Wechsler Intelligence Scale for

Children-Fourth Edition) and reported similar results. In both evaluations Student's full scale IQ (FSIQ) fell into the low-average range, but with significant variability among the subtest scores. Both of the independent psychologists noted that the pattern of scores suggested that the FSIQ underestimated Student's cognitive ability, primarily due to the effects of ADHD, as well as sensory and executive functioning issues that adversely affect Student's working memory and processing speed. (N.T. pp. 85, 86, 88, 106, 160; P-2 pp. 19; S-11 p. 4)

15. The independent school psychologist concluded that Student also meets the IDEA criteria for specific learning disabilities based upon the GAI (General Ability Index) score he calculated from the WISC-IV and Student's standardized achievement test scores on the WIAT-III (Wechsler Individual Achievement Test-Third Edition). On that assessment, Student's scores in listening comprehension, reading comprehension oral reading fluency and math problem-solving were in the low average range. Scores on sentence composition, word reading, pseudoword decoding, oral expression and numerical operations were in the average range. Math fluency in addition, subtraction and multiplication were in the borderline range. (P-2 pp. 20, 21)
16. The District's school psychologist agreed that an examination of strengths and weaknesses disclosed by the test results provides more information than a single, global score representing a measure of cognitive ability. (N.T. pp. 359—362)
17. In terms of addressing Student's ADHD symptoms, recommendations for effective programming for Student from both private evaluators and District staff include small group instruction, chunking of work and assignments, visual and verbal prompting, preferential placement close to the teacher. (N.T. pp. 36, 37, 39, 115)
18. To address deficits in several areas, including those related to both ADHD and ASD, Student needs intensive intervention to develop social skills, including significant opportunities to practice appropriate social interactions with peers. The use of "social stories" to understand various anticipated situations is an appropriate intervention, but Student also needs to develop conversational and other skills for engaging with peers. Parents' expert witnesses agreed that Student's sensory needs, as well as social skill deficits, should be addressed through much more intensive school-based interventions than Student has received. To effectively address sensory needs, Student should have a full sensory integration evaluation in order to develop a complete sensory integration program. (N.T. pp. 37—41, 45, 71—77, 119; P-2 p. 32, S-8 pp. 13, 14)
19. Based upon review of Student's IEPs and information from Parents and teachers, Student's current treating psychiatrist does not believe that the District was sufficiently challenging Student academically or effectively addressing social skill needs, given the level of difficulty Student was reported to be experiencing with peer interactions. (N.T. pp. 39—41, S-8 pp. 13, 14)

District Placement/Services—2011/2012, 2012/2013 School Years

20. For the 2011/2012 and 2012/2013 school years (3rd and 4th grades), Student received small group instruction in English/language arts, including reading and written communication, and math from a special education teacher in the learning support classroom. Student was included in general education classes for science and social studies, with modifications, as well as for homeroom, lunch and specials. (N. T. pp. 393, 456; S-5 p. 6, S-22 p. 6)
21. During 3rd grade, the learning support teacher sometimes taught skills that Student found more difficult, such as math word problems and reading comprehension, using 2nd or 1st grade materials in order to assure that Student was successful and to reduce frustration. In October 2011, Student's reading level was frustrational at the 2nd grade level. N.T. pp. 401, 402; S-29 pp. 4, 13, 15)
22. Although Student's IEP goal was written for increasing fluency and comprehension at the 3rd grade reading level, Student did not begin using 3rd grade level reading materials during 3rd grade, and did not advance beyond below level 2nd grade books in the leveled reader aspect of the District's reading program during that school year. Even when Student's scores reflected significant improvement in reading fluency and comprehension, the progress monitoring reports did not reflect the high level of support Student needed to reach the reported levels. The teacher did not move Student to below level 3rd grade leveled readers because of the lack of independence in Student's performance on periodic assessments. (N.T. pp. 411—413, 420—422; S-29 p. 21)
23. The 3rd grade learning support teacher did not intend to move Student to on level 2nd grade leveled readers because of the length and complexity of the stories and increased length of the assessments accompanying the on level reading materials. (N.T. pp. 447—450)
24. To further avoid frustration and stress in the classroom and assure Student's success, the 3rd grade teacher often sent reading and math worksheets home for Student to prepare for instruction with unfamiliar materials and tests. (N.T. pp. 404—406)
25. In math, Student could complete 1 digit addition and subtraction problems independently, using the "Touch Math" system but needed significant support for 2 digit problems, especially with re-grouping, in order to avoid frustration and stress. For the same reason, Student was not asked to perform timed math drills. (N.T. pp. 415, 416), 425—427)
26. In the fall of 4th grade, Student's needs as identified in the District evaluation included using/improving self-regulation strategies to improve frustration levels, including a self-awareness scale, along with frequent sensory input and breaks; developing skills in listening comprehension, semantics, and pragmatic/social skills. (N.T. pp. S-8, pp. 16, 17)

27. At the time of the District's 2012 evaluation, Student's listening comprehension, oral expression and written expression skills were below average as measured by curriculum-based assessments. Student could write five short, simple sentences with little word variety, all beginning with the same word and without capitalizing the first word (N.T. pp. S-8 pp. 11, 12, 16)
28. On curriculum-based assessments, Student's basic reading skills were below average. On a measure of fluency and comprehension, Student's reading level appeared to be independent at early 3rd grade, instructional at late 3rd grade and frustrational at early 4th grade. Although Student ended 3rd grade without advancing past the below level 2nd grade leveled readers, Student received private, one to one tutoring in reading and math from a special education teacher during the summer of 2012. (N.T. pp. 184, 185, 480—484, S-8, pp. 10, 11)
29. In math, Student's skill level was average for calculation but below average for math reasoning. Student could not tell time on an analog clock and had difficulty counting mixed groups of coins, although student could accurately identify paper currency and coins. (S-8 p. 12)
30. In December 2012, after the District's evaluation was completed, Student's IEP team met to develop a new IEP. In the area of speech/language, the December IEP included goals for developing semantic language and listening comprehension skills identical to the goals in the October 2012 IEP. (N.T. p. 525; S-5 pp. 30, 31, S-22 pp. 21, 22)
31. The OT goals in the October and December 2012 IEPs were also identical, but the December IEP provided for Student to use a 3 point rating scale for identifying Student's level of self-control and choosing an appropriate strategy for reducing frustration. During the second quarterly marking period, the chart was dropped and other self-regulation strategies were implemented. Student expressed frustration in OT sessions when asked to discuss regulating emotions (N.T. pp. 624—626; S-5 p. 34, S-22 p. 24, S-23 p. 7)
32. The reading comprehension, writing, math computation and word problem goals were also identical in the October and December 2012 IEPs. (S-5 pp. 35—38, S-22 pp. 25—28)
33. Student's 4th grade learning support teachers continued providing Student with a high level of support in reading and math instruction, as well as when conducting tests/assessments. (N.T. pp.463—465, 467, 468, 476—479)
34. The 4th grade learning support teacher used a reward system as a behavior modification strategy. After an initial outburst soon after she began teaching Student, she reported no other extreme behaviors. Student still exhibited the behaviors described in the District's 2012 reevaluation report, but could generally be re-directed. (N.T. pp. 512—518, 545, 546; S-8)

35. By the second progress monitoring period, Student had advanced to on level 4th grade leveled readers and achieved consistently high scores for the remainder of the school year on reading comprehension assessments with continuing opportunities for repetition and review. Student did not do as well with “cold” reads. (N.T. pp.527—532; S-22 pp. 9—12)
36. In math, Student’s goals were increased over the course of the year from single to double digit addition and subtraction without and later with re-grouping. Prompting was used for progress monitoring assessments. Student also moved from single to multi-step word problems. (N.T. pp. 539, 540; S-22)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Standards

FAPE/Meaningful Benefit

The legal obligation to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Shore Reg’l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009).

“Meaningful benefit” means that an eligible child’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). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204

(3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 251 (3rd Cir. 2009); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parents have challenged the District’s actions during the period in dispute, Parents must establish the violations they alleged and that were identified at the beginning of the due process hearing in this case.

The Supreme Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with

the evidence at various points in the proceeding. Allocating the burden of persuasion affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012).

Here the burden of proof analysis does not affect the outcome, since Parents produced ample evidence in support of their claims.

Basis of Parents’ Complaint/District’s IDEA Violations

Although Parents in this case have been very concerned about Student’s progress in both academics and social functioning for some time, their concerns became more urgent at the beginning of the 4th grade school year (2012/2013). Parents noted that Student was unable to replicate at home the skills that the District reported Student could demonstrate in the special education classroom. As reported by District staff, in the fall of 2012, Student continued to need significant accommodations to support academic performance in the classroom, exhibited low tolerance for frustration and was not socially engaged with peers. (FF 6, 34)

Underlying the increased urgency of Parent’s concerns is the approach of middle school and their additional concerns about how Student will function in that more challenging setting. Parents believe that the District consistently underestimated Student’s cognitive potential and, therefore did not seriously attempt to move Student toward acquiring sufficient reading and math skills to enable Student to fully participate in the general education grade level curriculum. In addition, they do not believe that the District adequately addressed Student’s social skills and sensory needs.

Parents’ concerns are well founded. The record establishes that during 3rd and 4th grades the District did not recognize and comprehensively address all of Student’s disability-related

needs. Moreover, in 3rd grade, in particular, the District instructed Student in the basic academic skills of reading, math at the pace and with the level of support dictated by the frustration Student exhibited in the course of acquiring new and difficult skills, without considering whether providing additional services to ameliorate the effects of sensory processing and attention issues, might have improved Student's school functioning and academic performance. In short, as Parents suggested, the evidence established that in 3rd grade, especially, in attempting to avoid challenging behaviors arising from Student's frustration with more difficult academic challenges, the teacher's focus was on assuring that Student felt successful even if that meant allowing Student to make virtually no progress in reading and math. (FF 21—25)

In this case, it appears that the District, unfortunately, missed the point of Parents' concerns. The problem that ultimately led to the due process hearing was Parents' frustration at their inability to determine where Student was actually functioning, academically, in comparison to grade level peers. A real discussion between the parties concerning how to determine not only the level of Student's skills in reading and math, but how to improve Student's academic skills and overall functioning while fading supports over time might have been productive. The District, however, clearly did not see a need for significant changes to the way it was instructing Student and did not engage in a real discussion with Parents about their concerns, at least not with a view toward making any significant changes to Student's instruction and related services.

Of greater concern going forward is determining what the District needs to do to in the short term to meet Student's disability needs that it did not sufficiently or appropriately address in the past, and what it will be required to do if Parents want Student to return to the public school.

Parents provided evidence from an independent school psychologist who evaluated Student in May 2013 that Student should be identified as a child with average intelligence and a specific learning disability. (FF 15) There is also a question whether ASD should be added as a disability category. Those are not, however, matters that need to be explicitly determined based upon the hearing record. Unless there is some urgency arising from the question whether Student is IDEA eligible in any category, identification is best left to Student's IEP team to consider based upon evaluation results. Here, the private psychoeducational evaluation report that included specific learning disability and ASD as proposed eligibility categories was not completed until June 2013, close to the time the due process complaint was filed. Although there would have been no problem, and it would have furthered the purposes of IDEA, had the District convened Student's IEP team to consider changes based on the private evaluation report, that likely could not realistically have occurred during the summer. If Parents decide to reenroll Student in public school, however, the District should convene an IEP meeting to fully consider Parents' private evaluations, including a discussion whether any change should be made to Student's disability category.

The immediate question is whether the District failed to identify and address all of Student's needs, and that is clearly the case. Even without the recent diagnosis of ASD, Student's social skills deficits and sensory needs were well known to the District. (FF 26) The District school psychologist acknowledged that there had been discussion concerning the possibility that Student had an ASD. (FF16) The District had sufficient information to understand that Student's social skill deficits should be explicitly and systematically addressed with a pragmatic language/social skills IEP goal and additional speech/language therapy directed toward developing pragmatic language skills. The District however clearly did not consider

Student's significant social skills and pragmatic language difficulties as matters that needed sustained and systematic attention through speech/language services or other means of social skills training.

Similarly, Student's sensory needs were well known to the District, but were not systematically and comprehensively addressed in Student's IEPs in 3rd and 4th grades. The opinion of Parents' independent school psychologist that Student should have a full sensory integration evaluation followed by development of a sensory integration plan makes sense and will be ordered.

Although Parents want the District to acknowledge that Student has average intelligence, it is not entirely clear whether that would have any practical effect on the instruction Student receives. Student is already receiving special education services in a learning support setting. Parents, however, are obviously concerned that if the District believes that Student has lower than average cognitive ability, it may well conclude that Student is ultimately incapable of learning the same content in academic courses as grade level peers, and may see no reason to aggressively attempt to bring Student to grade level in reading and math. The record, however, demonstrates that Student is capable of moving forward academically with more intensive instruction, including at least some 1:1 instruction. (FF 28)

In summary, the record in this case established that the District did not provide Student with all necessary academic instruction and related services during the 2011/2012 and 2012/2013 school years. The District, therefore, will be ordered to provide Student with compensatory education equal to the amount of time Student spent in the learning support classroom during 3rd and 4th grades. Based upon the IEP in effect in those school years, that is 2.3 hours/day for the 2011/2012 school year (S-29 p. 35) and 2.6 hours/day for the 2012/2013 school year. (S-5 p. 47)

In addition, the District will be ordered to provide Student with compensatory education equivalent to an additional 60 minutes/month of OT services to address sensory integration needs and 120 minutes/month that should have been provided for pragmatic language/social skills instruction. The District will also be ordered to conduct a sensory integration evaluation.

ORDER

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

1. Provide Student with 2.3 hours of compensatory education for every day that school was in session and Student was present during the 2011/2012 school year.
2. Provide Student with 2.6 hours of compensatory education for every day that school was in session and Student was present during the 2012/2013 school year
3. Provide Student with 180 minutes of compensatory education for every month that school was in session during the 2011/2012 and 2012/2013 school years.

It is **FURTHER ORDERED** that the compensatory education hours shall be used for instruction/tutoring and/or social skills training, occupational therapy, speech/language therapy.

It is **FURHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

November 15, 2013