

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.G.

ODR #14523/13-14-KE

Date of Birth:
[redacted]

Date of Hearing:
January 17, 2014

OPEN HEARING

Parties to the Hearing:
Parent[s]

Representative:
Pro Se

Young Scholars Kenderton Charter School
1500 West Ontario Street
Philadelphia, PA 19140

Patricia Fecile-Moreland, Esquire
Marks, O'Neill, O'Brien, Doherty & Kelly
1800 John F. Kennedy Boulevard
Philadelphia, PA 19103

Date Record Closed:

January 22, 2014

Date of Decision:

January 27, 2014

Hearing Officer:

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

Background

Student¹ is an early elementary school-aged student whose Local Educational Agency [LEA] is a Charter School [hereinafter the School] and who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the current classification of Autism. Student's Parent requested this hearing because she disagrees with the School's including Student in regular education classes and wants Student to receive all Student's instruction in the Autistic Support classroom rather than going out to any regular education classes.

The School maintains that inclusion of Student is appropriate, and that in order for Student to receive a free appropriate public education [FAPE] it must follow the IDEA mandate that each child be educated in the least restrictive environment [LRE] appropriate for that child.

In an attempt to bring the Parent and the School into agreement regarding an appropriate placement, the School offered to conduct a re-evaluation; the Parent rejected this offer and requested a due process hearing.

After listening to the testimony of the Parent, the family's Behavior Specialist Consultant [BSC] and the School's Director of Student Support, I determined that Student should receive a complete multidisciplinary re-evaluation and at the conclusion of the hearing ordered that it be started forthwith and completed within 60 calendar days of the hearing date.

Issue

In order for Student to receive FAPE, should the School place Student in regular education classes against the wishes of the Parent?

Findings of Fact

1. Student has been receiving autistic support services since age 15 months. When Student entered Kindergarten Student was placed in the current school building, which is not Student's neighborhood school, because there was an Autistic Support classroom located in the building.² [NT 13, 62]³
2. The building was formerly a School District of Philadelphia [SDOP] public school, but in August 2013 the Charter School took over the operation of the building and pupils

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 Under previous leadership the building was a hub for Autistic Support and Emotional Support programs, and it continues in this capacity under the School's operation. [NT 63]

³ "NT" refers to the Notes of Testimony which is the transcript; page numbers are referenced.

entered the last week of August. The School now operates as a public charter school and remains a neighborhood school. [NT-17, 62-63]

3. The Parent testified⁴ that Student did well in Kindergarten and 1st grade in the SDOP Autistic Support class⁵. [NT 13-14]
4. The IEPs of 10-14-11 and 10-22-12 that governed Student's special education program in kindergarten and 1st grade provided for Supplemental⁶ Autistic Support. Student's mother signed and approved the IEPs. However she understood, and believes that it was explained to her, that Supplemental Autistic Support means that Student would remain in the Autistic Support classroom for all Student's instruction and that the instruction would be supplemented by things such as headphones used within the Autistic Support classroom. [NT 23, 28-30, 35-36]
5. If the Parent had understood that Supplemental Autistic Support meant that Student would leave the Autistic Support classroom for any part of the school day she would not have approved the IEPs. [NT 30, 43]
6. Prior to listening to the Parent testify, the School was not fully aware that she had a different understanding of what the IEPs presented by the SDOP and that she signed meant. [NT34-35]
7. When the School began operating the building the Director of Student Support reviewed the IEPs of all the special education children, including Student's. Over the course of consulting with the special education liaison from SDOP, the School's Director of Student Support learned that in fact regardless of what the SDOP IEPs for the Autistic Support and Emotional Support children provided, these children were being educated in their special education classrooms full time. [NT 65]
8. The School reached out to the parents of the Autistic Support and Emotional Support children and confirmed this understanding. The Director of Student Services communicated to the parents that at the start of the school year, because the School did not know these children or their needs, they were probably going to be self-contained in their classes for a period of time. [NT 66, 68]

⁴ The Parent acted pro se. In order to allow the Parent to provide her testimony without undue procedural interference, she was sworn in prior to giving her opening statement which comprised her direct testimony. Any subsequent statements from the Parent were considered as having been made under oath. The attorney for the School graciously accepted this method of proceeding.

⁵ The Parent did assert however that Student regressed in 1st grade because of the teacher. The Parent is not raising that issue in this hearing and was advised that if she wished to pursue it that matter would properly be raised against the SDOP. [NT 29-30]

⁶ I note that the term "Supplemental" is confusing, and agree with the BSC's statements in this regard. [NT 52]. The term "Supplemental" replaces the former term "Part-Time" which was much clearer. A child receiving Supplemental special education spends from 40 percent to 79 percent of the school day in regular education settings. It is also important to note that even if children are receiving "Full Time" special education, the majority of those children are still included in regular education lunch, recess, assemblies, and sometimes "specials" such as art, music and gym.

9. The School also communicated to all the parents, including Student's Parent, that the goal was to include the children in regular education classes as appropriate and according to their needs. Student's teacher communicated this to the Parent and when the Parent seemed hesitant the Director of Student Support also contacted the Parent to assure her that Student was not being exited from the Autistic Support program. Once the School got to know the children and saw that the regular education classrooms were ready to receive them the School began contacting parents about inclusion. [NT 69, 92]
10. The School made the decision to wait about a month before implementing inclusion for the special education children. This was based on three factors: 1) the School was just stepping into an established building and had no direct knowledge of any of the children, whether special education or regular education; 2) the School wanted to spend a little time getting to know the special education children before putting them into regular education classes; 3) the School wanted to allow the regular education teachers time to establish instructional control over their regular education students before introducing special education students into the classes. [NT 66]
11. Student's Autistic Support classroom serves children Kindergarten through 2nd grade. As of September 2013 Student's class was joined by several new children just entering Kindergarten. Some of the children coming into Student's classroom were very young and very "high needs" and closer to preschool level; some were functionally non-verbal. [NT 70-71]
12. The Autistic Support class with its high needs younger children can be a noisy environment. The Director of Student Support sees moving Student as appropriate into regular education classes can serve as a sensory break for Student. [NT 81, 89]
13. The School observed that Student and one other 2nd grader were higher functioning than the rest of their classmates in the Autistic Support class and "exceeded the utility"⁷ of the Autistic Support class for some of their academics. After reviewing past IEP data and current academic progress and behavioral data, at the end of September or the beginning of October the School began to implement Student's Supplemental Autistic Support placement as specified in the IEP by having Student go with the TSS and the other peer into two regular education 2nd grade classes, mathematics and reading. [NT 70-72]
14. The Parent was informed of this arrangement. [NT 72]
15. Within a week, there were concerns from the teachers, the TSS and the Parent suggesting that Student was having some difficulty transitioning into the two regular education classes and that the academic difficulty may be causing frustration and some reactive behaviors. [NT 72-73]
16. The Parent contacted the Director of Student Support with concerns that the work was too hard for Student. The Director suggested giving the Student a little more time to adjust

⁷ The transcript erroneously says "extended the utility". [NT 72]

and then if necessary dropping the reading class and/or moving Student to a 1st grade regular education math class. [NT 73]

17. The Director of Student Support also told the Parent that accommodations would be made so Student could participate in the regular education classes. One possible accommodation he suggested was that if Student stayed in the 2nd grade math class Student could be excused from doing homework for that class if homework was presenting difficulty. [NT 73-74, 87]
18. The Director of Student Support also explained to the Parent the School's stance on placement based on the legal requirements for inclusion of special education students into regular education classes as appropriate. [NT 73]
19. Within a day or two the Parent called the Director of Student Support back and said that she did not want Student leaving the Autistic Support classroom at all. Again the Director of Student Support explained LRE requirements to the Parent and indicated that the School had to follow Student's IEP. The Parent disagreed and a meeting was held on October 31st to discuss the matter. A re-evaluation was proposed with the BSC being in complete agreement, but the Parent refused and indicated wanting a due process hearing. [NT 73, 75, 78-79, 81-85; S-1]
20. Following the October 31st meeting, the School removed the regular education reading class and, as it seemed that the 2nd grade math class may have been too difficult for Student, the School placed Student in a 1st grade math class instead. [NT 75, 82; S-1]
21. Student along with a few other children from the Autistic Support class are accompanied to the regular 1st grade math class by their Autistic Support teacher. Student's TSS also accompanies Student to that class. [NT 79, 84]
22. Student's last report card showed Student doing very well in the 1st grade math class. The regular education teacher reports that Student completes 90% of the work in class, has exhibited no negative behaviors, volunteers answers in the class, has showed other students how to do certain problems and is always the first to start and finish the work. [NT 85]
23. The TSS's observations transmitted to the BSC also are that Student is doing very well in the 1st grade math class and everything the BSC has heard so far has been excellent. [NT 51]
24. The Parent believes that going into regular education classes is too much for Student to handle at this time, although she believes that eventually Student may be able to handle some inclusion. [NT 14]
25. The Parent maintains that Student is very sensitive to noise, that Student is an introvert and that things have to be introduced to Student slowly. [NT 14]

26. The Parent maintains that at home Student expresses that Student doesn't like it at school and that this comes out particularly at homework time. [NT 14-15]
27. The Parent testified that Student's home-based Therapeutic Staff Support [TSS] worker has a hard time getting Student to focus on completing homework. [NT 15, 37]
28. Student refuses to do homework and tells the Parent that Student "did enough work at school already today". [NT 38]
29. The Parent reports that Student is "frustrated" when Student comes home from school, and doesn't want to talk about school, which was not the case in the past. [NT 15, 43]
30. The Parent testified that not every day, but some days, Student tells her that Student wants to stay in Ms. [redacted] room. [NT 41]
31. Whereas previously Student willingly completed workbooks the Parent provided at home, currently Student resists this activity. [NT 16]
32. The Parent testified that Student loves school and would attend weekends if possible. Student has never expressed resistance to school work before this year. [NT 39]
33. Student is a verbal child. [NT 36]
34. Student is learning to read. [NT 36]
35. Student can write some letters and words and the Parent testified that Student "writes a lot". [NT 36]
36. Student has some beginning mathematics skills. [NT 36]
37. The family's BSC attended the last IEP meeting and strongly supports a reevaluation for Student so the Parent and the School would each have the same information to use to address Student's needs. [NT 46, 51]
38. The BSC has recommended to the Parent that she agree to a reevaluation but the Parent has not been responsive to the School's or his recommendation. [NT 53]
39. The BSC has received the impression that Student is doing well in the one regular education classroom Student attends because Student has rapport with the teachers and the support of the TSS. [NT 47-48]
40. The BSC's professional opinion is that it may have been too abrupt a transition to have Student attend two regular education classes right away, and that starting with one may have been better. However, given Student's academic potential the BSC is strongly supportive of mainstreaming [inclusion] for Student. [NT 48]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parent asked for a hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not 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). I had no question that each of the three witnesses testified honestly and to the best of his/her recollection. Each witness provided pieces of information that helped complete the picture of what was occurring between the parties. Each witness's testimony was given serious and careful consideration.

Charter Schools: The Individuals with Disabilities Education Act (IDEA) requires states to provide a "free appropriate public education" to all students who qualify for special education services.⁸ Pennsylvania implements IDEA by way of 22 Pa. Code Chapter 14. However, under the enabling Act 22 of June 12, 1997 Pennsylvania charter schools were to be autonomous "independent public schools" free from certain regulations. Thus Pennsylvania charter schools had an exemption from the special education aspects of 22 Pa. Code Chapter 14 and were simply required to comply with federal law. On June 8, 2001, the Charter School Services and Programs for Children with Disabilities Law,⁹ was adopted and became effective on June 9, 2001 to specify how the Commonwealth of Pennsylvania would meet its obligations to ensure that charter schools comply with the IDEA and its implementing regulations.¹⁰ Accordingly, from June 12, 1997, to June 8, 2001, Pennsylvania charter schools were governed in the area of special education under the Federal Laws. Effective June 9, 2001, 22 Pa. Code §711.1 et seq., also governs special education in Pennsylvania Charter Schools. *See also, R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F.Supp.2d 745 (E.D.Pa.2010)

Special Education: 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". 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). LEAs provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education

⁸ 20 U.S.C. §1412.

⁹ 22 Pa. Code §711.1 et seq

¹⁰ 34 CFR Part 300, and Section 504 and its implementing regulations in 34 CFR Part 104

Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefit”, a principle established by over thirty years of case law. *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); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009).

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.

“Meaningful educational 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, 247 (3d Cir. 1999). An eligible student is denied FAPE if the IEP 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).

Least Restrictive Environment: The IDEA requires that all eligible children must be educated (receive FAPE) in the “least restrictive environment” (“LRE”), that is, to the maximum extent appropriate, with their typical peers. *See* 20 U.S.C. § 1412(5). Congress has expressed a clear intent and preference that disabled children be placed in regular education classes, and that removal of a student from regular education classrooms is permissible “only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C.A. § 1412(a)(5)(A); 34 CFR §300.550.¹¹ There is a continuum of educational placements, and each student’s placement must be matched to that student’s level of need.

A plethora of case law supports IDEA’s mandate that education must occur in the least restrictive environment appropriate for the individual child. Our Third Circuit early on recognized and applied the principle of LRE in *Oberti v. Bd. Of Educ. Of the Borough of Clementon Sch. Dist.*, 995 F. 2d 1204; 19 IDELR 908 (3d Cir. 1993). The expectation of least restrictive environment is so rigorous that the courts have held, for example, that an LEA is prohibited from placing a child with disabilities outside of a regular education classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. If the LEA fails to offer the student a program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. *Millersburg Area School District v. Lynda T.*, 707 A.2d 572 (1998).

Oberti counsels that the failure to consider the full range of supplementary aids and services to enable a student to be educated in regular class to the maximum extent appropriate is sufficient

¹¹ 22 Pa. Code § 14.131(b) and 22 Pa. Code § 14.102 (a)(2) adopt all federal regulatory requirements for a student’s educational program, including the requirement that a student be educated in the least restrictive environment.

to establish liability for violating the mainstreaming requirement of the IDEA. “If the school has given no serious consideration to including the child in a regular class with supplementary aids and services and modifying the regular curriculum to accommodate the child, then it has most likely violated the Act’s mainstreaming directive.”

Parental Participation: 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).

Discussion and Conclusions

It is clear that the Parent is a sincere advocate for her child, wants her child to do well in school and wants her child to be comfortable in the school environment. Unfortunately the previous LEA appears not to have made this concerned Parent a full partner in her child’s education. The previous LEA failed to clearly explain to the Parent Student’s entitlement under the law, and although the previous LEA wrote an IEP paying lip-service on paper to Student’s right to LRE, it did not implement the IEP. The Parent, not knowing the requirements of the law and the benefits to which her child is entitled, came to believe that the way things were going was the way things were supposed to be.

When the School took over the building and its students, and assumed the responsibility for this particular Student, it attempted, after spending a few weeks reasonably assessing the overall situation, to properly begin implementing Student’s IEP which called for Supplemental Autistic Support. Based on previous records of Student’s progress and its current observations of Student’s abilities, the School ascertained that Student, a 2nd grader, was one of two older as well as higher functioning pupils in the class. The School also took into consideration that the composition of the Autistic Support classroom had changed with the arrival of younger, noisier kindergarteners with a high level of needs. Therefore, the School formed a plan to begin including Student in two 2nd grade regular education classes with support including being accompanied by Student’s TSS worker and informed the Parent of the plan.

Whether because after two solid years Student was used to staying in the Autistic Support classroom all day and hence resisted leaving, or whether the transition to going into regular education classes was not gradual enough, or whether the actual academic work was too difficult - or a combination of all three factors possibly including the change in the Autistic Support class composition as well - Student conveyed within a few days that Student was not as happy with school as Student had been in the past. The Parent reported that Student manifested these feelings through presenting difficulty at homework time and voicing the desire to stay in the Autistic Support class. The Parent immediately contacted the School; the School responded to the Parent’s concerns by suggesting giving Student a few weeks to settle in and, if Student did not adjust, then modifying the plan/schedule and providing accommodations such as lifting the requirement for homework. Because of her fixed belief that Student would be best served by remaining in the Autistic Support class all day the Parent is resisting inclusion, although the School is continuing to include Student in one regular education class at this time.

I recognize the School's double burden in this matter – providing an appropriate placement under the law while at the same time trying to undo the incorrect impression with which the former LEA left this Parent. I also recognize the Parent's burden in this matter – making sure her child is comfortable in school and reconciling the way she thought things were supposed to be with what she is now being told are how they should be. However, the IDEA's mandate is clear and it is that disabled children must be educated with typically developing children to the extent possible. LRE is a bedrock principle inextricably intertwined with providing FAPE. The IDEA does not leave LRE to parental discretion or choice. The IDEA does not leave LRE to LEA discretion or choice. Other than determining whether a setting is appropriate for the individual child, the IDEA does not even leave LRE to a hearing officer's discretion or choice. Children with disabilities have an absolute unfettered right to be educated along with their disabled peers in the appropriate setting that is the least restrictive for them individually. This is the right of Student who is the subject of this decision, and the School is responsible for making sure that right is preserved and honored.

In this matter I find in favor of the School as it has a duty under federal and state law to include Student in regular education classes with supportive aids and services to the maximum extent appropriate for Student.

Order

It is hereby ordered that:

In order for Student to receive FAPE under the federal and state laws governing special education, Student must be included in regular education classes to the maximum extent appropriate, and at whatever grade level is appropriate, with the supports and services necessary for Student to succeed in those classes. Nothing in this Order prohibits the IEP team from gradually implementing this requirement, and nothing in this order requires that Student be entirely removed from the Autistic Support classroom.

It is also hereby ordered and affirmed that within 60 calendar days of January 17, 2014 – that is on or before March 18, 2014 – the School must conduct, complete and transmit in written report form to the Parent a complete reevaluation of Student that includes parent interview, observations in both special education class and regular education class, cognitive assessment, academic achievement assessment, speech/language assessment and behavioral assessment. Parental permission for this evaluation is not required.

Within 15 days of the completion of the reevaluation the IEP team shall meet to plan Student's gradual appropriate inclusion in regular education classes with the proper supports and services.

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

January 27, 2014

Date

Linda M. Valentini, Psy.D., CHO

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