

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

Child's Name: M.S.

Date of Birth: [redacted]

Dates of Hearing:

March 6, 2014

March 7, 2014

March 10, 2014

March 17, 2014

March 18, 2014

CLOSED HEARING

ODR Case # 14526-1314KE

Parties to the Hearing:

Parent[s]

Representative:

Pro Se

Pennsbury School District
134 Yardley Avenue
P.O. Box 338
Fallsington, PA 19058

Thomas Warner, Esquire
Sweet Stevens Katz & Williams
331 E. Butler Avenue
New Britain, PA 18901

Date Record Closed:

April 9, 2014

Date of Decision:

April 23, 2014

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (“student”) is [a pre-teenaged] student residing in the Pennsbury School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)¹. The student has been identified under the terms of IDEA as a student with specific learning disabilities and a speech and language impairment.

In December 2013, the District sought to change the student’s placement in order to deliver specially designed instruction for reading and mathematics in a resource room environment instead of an inclusive, co-taught classroom. The District also sought permission to perform a functional behavior assessment (“FBA”) as the result of certain in-school behaviors exhibited by the student.

The student’s mother did not oppose the proposed change in placement or the request for a FBA. The student’s father, however, took exception to both proposals by the District.

For the reasons set forth below, I find in favor of the father in certain regards and in favor of the District in other regards. The order will also contain certain explicit directives to the student’s individualized education plan (“IEP”) team.

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

ISSUES

Is the program/placement proposed by the District appropriate for the student?

Should the District be allowed to perform a FBA?

FINDINGS OF FACT

1. The 2012-2013 school year was the student's 5th grade year at the District. Given the structure of District schools, the student's 6th grade year in 2013-2014 would necessitate a move to a middle school.
2. In May 2013, the student was re-evaluated (Joint Exhibit ["J"]-1, J-2, J-3, J-4, J-5, J-6, J-7, J-13).
3. The May 2013 re-evaluation report ("RR") identified the student with specific learning disabilities in the areas of reading comprehension, math problem-solving, and listening comprehension. (J-13).
4. Given needs in auditory comprehension, pragmatic language, semantics, and syntax skills, the student was also identified as a student with a speech and language impairment. (J-13).
5. The May 2013 RR noted, from teacher input, that the student had difficulty attending to task, social/emotional difficulties in school settings, socially inappropriate behaviors (singing the alphabet

- song, immature expressions), and exhibited noise-making, talking out loudly to self, and inappropriately laughing out loud. (J-13).
6. The evaluator who authored the May 2013 RR observed the student in a classroom setting and reported off-task behaviors in that setting, including many behaviors (such as inattention and laughter) similar to those reported by the student's teachers. (J-13).
 7. In June 2013, the student's IEP was revised. Over the course of June-September 2013, the student's IEP was revised by the student's IEP team for implementation at the middle school in the 2013-2014 school year. (Parent's Exhibit ["P"]-134).
 8. The June 2013 IEP indicated that communication needs were a special consideration for the student. In the same portion of the IEP, however, there was no indication that the student exhibited behaviors that impeded the student's learning or the learning of others. (P-134 at page 6).
 9. The June 2013 IEP indicated transition to middle school might present challenges for the student, with a view toward potential changes in how the student's program/placement might unfold. At that point in the IEP and later, in a recitation of parental concerns, the student's father explicitly disagreed with notions that a movement out of the regular education would benefit the student. (J-19; P-134 at pages 8-11).

10. The June 2013 IEP included eight goals: three speech and language goals, a math concepts/applications goal, two reading goals, and a written expression goal, and an occupational therapy goal. (P-134 at pages 17-30).
11. The June 2013 IEP included specially designed instruction in addition to related services in speech/language therapy and occupational therapy. (P-134 at page 32-34).
12. The student qualified for extended school year (“ESY”) services in the summer of 2013. Data from the ESY program in the June 2013 IEP indicated that the student exhibited limited progress in reading. Progress on mathematics probes was reported at 90% accuracy. (P-134 at page 36).
13. In the June 2013 IEP, in a discussion of the student’s participation in the regular education curriculum, the IEP team agreed in July that the student would be in co-taught inclusion classes for all academic subjects. (P-134 at page 38).
14. Under the terms of the June 2013 IEP, the student spent 94% of the school day in regular education. (P-134 at page 40).
15. The student began middle school under the terms of the June 2013 IEP (with its various revisions) in the 2013-2014 school year. (P-134).
16. The student participated in co-taught inclusion classes for all academic instruction, with a special education teacher

- providing direct support to the student and to other students in the regular education classroom who required specially designed instruction. (Notes of Testimony [“NT”] at 192-405).
17. In October 2013, given concerns of the special education teacher and the student’s language arts teacher about the student’s progress, a District reading specialist administered two informal reading inventories. (P-194).
 18. On the Qualitative Reading Inventory-5, in word recognition, the student was independent at the 4th grade level, instructional at the “upper middle school” level, and frustrational at the “high school” level. In oral reading, the student showed consistency, although as the student progressed from pre-primer passages through 4th grade passages, the student’s accuracy percentages declined. The student’s comprehension beyond the pre-primer level, however, was markedly low. (P-194).
 19. On the Developmental Reading Assessment-2 (“DRA”), the student was an engaged reader, although the student required intervention. Oral reading was a relative strength, but the student continued to struggle with comprehension. (P-194).
 20. The evaluator’s summary was: “(The student’s) oral reading is stronger than...comprehension. The DRA also suggests that (the student) is comprehending text below...current grade level.” (P-194 at page 6).

21. At times during the informal evaluations, the student exhibited behaviors consistent with the inattentive and exclamatory behaviors (laughter, non sequiturs, seemingly off-hand and self-directed remarks) that had been reported throughout various observations and input. (P-194).
22. In October 2013, the student's parents, the building principal, and the District's then-director of special education observed the student in class. Thereafter, a group including these individuals in addition to the special education teacher and regular education teacher who were teaching the class, met to discuss the student's needs, including the observation. (NT at 564-565).
23. In November 2013, the District sought to revise the student's IEP, inviting both parents to an IEP meeting in December 2013. (J-20, J-21).
24. In December 2013, the student's IEP team met to discuss revisions to the student's IEP. (J-22).
25. The December 2013 IEP indicated, in the special considerations section, that a permission-to-evaluate the student would be issued to parents to seek a FBA of the student's behaviors in the school setting. (J-22).
26. The informal reading inventory results from October 2013 were included in the IEP. (J-22 at pages 6-10).

27. The December 2013 IEP included curriculum-based assessments from mathematics class. The student had intermittent success with certain aspects of computation. The student had intermittent success with certain aspects of mathematic concepts. (J-22 at pages 11-12).
28. The December 2013 IEP contained observations from the speech and language therapist indicating that the student was not consistent with safety information (when to summon emergency responders, and which particular responders might respond to certain situations). (J-22 at 14-16).
29. The December 2013 IEP contained parental concerns, shared just prior to or at the IEP meeting in mid-December. The student's mother was, in general, in agreement with the District's views of the student's needs and recommendations. The student's father continued to hold the view (shared throughout this record) that the focus of the student's education should be academic instruction in regular education environments. (J-22 at page 17).
30. The December 2013 IEP included twelve goals: five speech and language goals, two mathematics goals, two reading goals, a writing goal, a task attention/refocusing goal, and a listening comprehension goal. (J-22 at pages 24-35).
31. The December 2013 IEP included specially designed instruction in addition to related services in speech/language

- therapy. A new element of specially designed instruction/modification was a positive behavior support plan, to be developed following the FBA. (J-22 at page 36-40).
32. The December 2013 IEP recommended that the student receive instruction in a resource room setting for reading, mathematics and writing (45 minutes in each area daily). Additionally, the student would receive four 30-minute sessions weekly. (J-22 at page 43).
33. Under the terms of the December 2013 IEP, the student would spend 53% of the school day in regular education. (J-22 at page 45).
34. The student's mother approved the District's recommended education placement and program as reflected in the December 2013 IEP. The student's father did not approve the recommendation, and requested a due process hearing. (J-27, J-28).
35. In December 2013, the rejection by the student's father of the District's recommendation, and a subsequent complaint, brought forward the disagreement and claims that led to these proceedings. (J-28; Hearing Officer Exhibit -1).
36. Work product of the student in reading and general academics supports the conclusion that the student's reading and

writing needs to be addressed in a more intensive environment. (P-191).

37. Work product of the student in mathematics, while modified, supports the conclusion that the student made progress in mathematics in the co-taught inclusive classroom that was conceptually in line with the curriculum. (P-190, P-192).

38. Documentation of the student's speech and language instruction and therapy supports the conclusion that the proposed programming for the student in speech and language is appropriate. (P-193).

39. In January 2014, through the end of the 2nd marking period, the student's grades were as follows:

	1 st Marking Period	2 nd Marking Period
Language Arts	D	D
Mathematics	F	C
Art		C
Voice	B	
Science	D	C
Social Studies	C	C
Physical Education	A	A

(P-165).

40. The testimony of the student's language arts teacher and special education teacher, and the reading specialist, was all

credible and was accorded heavy weight regarding the student's need for reading and writing instruction in the resource room setting. (NT at 192-405, 414-529, 1260-1365).

41. The testimony of the student's math teacher and special education teacher was both credible and was accorded some weight regarding the student's needs in mathematics. The overall weight of the record regarding instruction of the student in mathematics, however, supports a conclusion that mathematics instruction in a co-taught inclusive classroom is the appropriate environment for such instruction. (NT at 192-405, 1066-1164).
42. The testimony of all the student's teachers was credible and was accorded some weight regarding the student's behaviors in the school setting. While no one who worked directly with the student testified that the student was, in any way, disruptive or difficult to redirect, the consistency of the testimony indicates that the student's behavior in the school environment requires a FBA. (NT at 192-405, 414-529, 725-852, 965-1045, 1066-1259).
43. The student's parents, while pointedly disagreeing about what the student's program, testified credibly and with authentic emotion about the care and concern each has for their child. The testimony of each, in its own way, was accorded heavy weight. (NT at 1402-1441).

DISCUSSION AND CONCLUSION OF LAW

FAPE in the LRE

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

Moreover, both federal and Pennsylvania law require that the placement of a student with a disability be in the LRE, considering the full range of supplemental aids and services that would allow a student to receive instruction and make progress in the LRE.⁶ Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the

² 34 C.F.R. §300.17.

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

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

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

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

use of supplementary aids and services cannot be achieved satisfactorily.”

Additionally, to comply with LRE mandates, the school district must ensure that “unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.”⁷

Pennsylvania special education regulations mirror this emphasis on LRE. Where a student “can, with the full range of supplementary aids and services, make meaningful education progress on the goals in...the IEP”, a school district cannot require separate schooling for a student.⁸ Similarly, “(a) student may not be removed from...(a) placement in a regular education classroom solely because of the nature or severity of the student’s disability, or solely because educating the student in the regular education classroom would necessitate additional cost or for administrative convenience.”⁹

In this case, the record clearly supports two findings. One, the student’s language arts instruction (reading and writing) needs to be intensively structured and delivered in a resource room setting. Two, the student’s behaviors in school are marked and complex enough to necessitate a FBA. The third finding—that the student’s mathematics instruction can and should be delivered in a co-taught inclusive regular

⁷ 34 C.F.R. §300.116(c).

⁸ 22 PA Code §14.145(3).

⁹ 22 PA Code §14.145(4).

education class—has support in the record; it is less definitive than the prior two findings, but, on balance, it is the LRE for such instruction.

Accordingly, the LRE for this student for academic instruction in reading and writing is a resource room environment; for academic instruction in mathematics, the LRE is a co-taught inclusive regular education classroom with appropriate supplemental aids and services. A FBA shall be performed to assess the student's behavior in educational environments.

ORDER

In accord with the findings of fact and conclusions of law as set forth above, on this record, the December 2013 IEP is reasonably calculated to yield meaningful education benefit. There are certain elements of the IEP, however, which shall be revised in accord with the terms of this order as set forth below.

Program & Placement. As of the date of this decision, the least restrictive environment for the student to receive instruction, with appropriate modifications, adaptations, aids, services and supports required by the student, is a split-program where the student receives some instruction in a resource room setting and some in an inclusive regular education classroom, both classrooms to be at the school the student would attend if not eligible for special education.

Instruction in reading and writing shall take place in a resource room setting. Instruction in mathematics shall take place in an inclusive regular education setting. Instruction and therapeutic techniques in speech and language shall take place where the student's IEP team determines this instruction would allow the student to gain meaningful education benefit from the instruction.

The student's December 2013 IEP shall be revised to reflect the placement changes as outlined in this order.

As set forth below, however, the student shall undergo a FBA in the educational setting. Because the FBA should take place in settings,

and with programming, that is not entirely new to the student, the implementation of the December 2013 IEP under the terms of this order shall not take place until the conclusion of “the FBA IEP meeting” set forth in the next section of this order.

Independent Functional Behavior Assessment. Finding that a FBA is necessary for future considerations of the student’s IEP team, and pursuant to the authority granted in 34 C.F.R. §300.502(d), it is ordered that:

- On or before May 3, 2014, the District shall provide in writing to the student’s father information (as set forth below) for three independent evaluators experienced in the conducting of data-gathering for, and authorship of, FBAs who will make themselves available to conduct an independent FBA at District expense.
- The District’s selection of the evaluators shall be based solely on the background and experience of the evaluators. Communications by the District with a potential evaluator shall not include any discussion of an evaluator’s rate or fee, and, in selecting the independent evaluators, the District shall not give any consideration to its estimation of the cost of the independent FBA.
- The information provided to the student’s father regarding the selected evaluators shall include the full curricula vitae

for the evaluators. The student's father may review the evaluators' curriculum vitae but shall not contact any of the potential evaluators.

- The cost of the independent FBA shall be at the evaluator's rate or fee and shall be borne by the District at public expense.
- On or before May 13, 2014, the student's father shall contact the District's director of special education by email to inform the District of the evaluator selected by the father to conduct the independent FBA.
- If the student's father has not emailed a selection of one of the independent evaluators by May 13, 2014, the District shall select one of the three independent evaluators. Even if the District makes the selection of the independent evaluator, all other aspects of this order related to the independent evaluator and/or the independent FBA shall be followed.
- The selected evaluator shall coordinate with the District on the scheduling of observations, but the number and nature of those observations shall be determined solely by the evaluator. Furthermore, the scope, details, findings and recommendations of the independent FBA shall be determined solely by the selected evaluator.

- After the independent evaluator has issued the independent FBA for the student, the student's IEP team shall meet to consider the findings of the assessment in light of the student's IEP and educational programming ("the FBA IEP meeting"). At the FBA IEP meeting, the IEP team shall invite and include the independent evaluator in the IEP team meeting (making scheduling accommodations for the participation of the evaluator as necessary), and the District shall bear any cost, or rate, for the appearance of the independent evaluator at the FBA IEP meeting.
- The terms of this order regarding the involvement of the independent evaluator shall cease after the independent evaluator has participated in the FBA IEP team meeting, although nothing in this order should be read to limit, or interfere with, the continued involvement of the independent evaluator as one party, or both parties, see(s) value in such continued involvement and might make arrangements therefor.

Agreements Otherwise by the IEP Team. Nothing in this order should be read to limit or interfere with the ability of the IEP team, by agreement of both parents and the District, to alter the explicit directives of this order related to the student's IEP. Nothing in this order should be read to limit or interfere with the ability of the IEP team, by agreement of

the both parents and the District, to make additions or deletions to the student's IEP.

Any claim not specifically addressed in this decision and order is denied.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

April 23, 2014