

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: N.T.

Date of Birth: [redacted]

Date of Hearing: April 6, 2011

CLOSED HEARING

ODR No. **1494-1011KE**

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Philadelphia City School District
440 N. Broad Street
Philadelphia, PA 19130

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Date Record Closed:

April 9, 2011

Date of Decision:

April 20, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (hereafter “Student”)¹ is a student in the above-named school district (hereafter “District”) and is eligible for special education under the Individuals with Disabilities Education Act (IDEA)² based upon a diagnosis of autism. Student’s Parents³ filed a due process complaint dated February 11, 2011 challenging the educational program provided to Student, and sought a private placement for Student at public expense as a proposed remedy.

The hearing convened in one session on April 6, 2011, at which time both parties presented evidence in support of their respective positions. For the reasons which follow, I find in favor of the District on the request for a private placement, but will direct the District to convene a meeting to address appropriate revisions to Student’s Individualized Education Program.

ISSUES

1. Whether Student has been provided with an appropriate educational program for the 2010-11 school year; and,
2. If Student has not been provided with an appropriate educational program, is an alternative placement in a private school at public expense an appropriate remedy?

FINDINGS OF FACT

1. Student is an elementary-school aged student who resides with the Parents within the geographical boundaries of the District. Student is eligible for special education based upon a diagnosis of Asperger’s Syndrome, which is on the autism spectrum. Student also has a speech/language impairment. (Notes of Testimony (N.T.) 25-26, 46; School District Exhibit (S) 2)
2. Student was evaluated in the spring of 2009 and a Reevaluation Report (RR) was issued on April 17, 2009. The RR reflected that Student was demonstrating mathematics skills in the low average to average range, and reading skills in the average to high average range. Needs were identified in the areas of speech/language (articulation and social language skills), as well as in concentration, attention, and organization. The RR

¹ Student’s name and gender are not used in this decision to protect Student’s privacy.

² 20 U.S.C. §§ 1401 *et seq.*; *see also* 34 C.F.R. §§ 300.1 *et seq.*

³ Student’s mother filed the complaint in this matter, but both parents participated in the due process hearing. Reference is made throughout this opinion to the “Parents” in the plural where it appears both parents were acting together or one was acting on behalf of both.

suggested that a Functional Behavioral Assessment (FBA) be conducted in relation to time on task, assignment completion, and social communication skills. Specially designed instruction for reading, mathematics, and communication skills was recommended, as was continued Speech/Language Therapy. (S 2)

3. An Individualized Education Program was developed for Student in June 2010 for the 2010-11 school year. Student's Present Levels of Academic Achievement and Functional Performance reflected that Student was reading on a fifth grade level and was below grade level in mathematics. Needs were identified in the areas of literacy, reading comprehension, some math computation skills, and social language. (N.T. 28-29; S 7)
4. The June 2, 2010 IEP contained goals addressing reading comprehension, written expression, and mathematics skills (division, mental computation, estimation, passage of time, and money). Speech/Language Therapy was included as a related service to address articulation needs. There was also a behavioral goal relating to remaining in Student's seat during instructional time. A number of items of specially designed instruction and program modifications were included in the IEP. (S 7)
5. The Parents approved the June 2, 2010 IEP and the Notice of Recommended Educational Placement (NOREP) which provided for itinerant learning support. (N.T. 37-39, 95-96, 114; S 7, S 8)
6. In October 2010, the Parents contacted the District and asked about providing Student with support for the regular education classes. The District tried unsuccessfully to convene a meeting with the Parents. (N.T. 33-37, 87-89; S 23 at 1, 3, 5, 12-13, 15)
7. An FBA was conducted in November 2010. The target behavior was dependence on others when a task was assigned. (N.T. 91-92; S 21)
8. A meeting convened in November 2010 to discuss Student's progress as well as the results of the FBA. Student's father attended the meeting. A Positive Behavioral Support Plan (PBSP) was developed which included a goal for completing assignments without assistance or dependence on others. The team also discussed Student's difficulties with content in the regular education classes. (N.T. 49-50, 52-54, 58-59, 92; S 22)
9. For the 2010-11 school year, Student goes to the regular education classroom in the mornings for Math and Reading, then goes to the learning support classroom for an additional period of Reading and an additional period of Math. Student then has lunch, then goes to either Social Studies or Science class in the regular classroom where a learning support teacher is also present to provide support for the students. Student then has a special class or Speech/Language Therapy. (N.T. 94)
10. In the learning support classroom, in the area of reading, Student worked on the IEP goals, used the Corrective Reading program, and also worked on writing skills. Student is making progress toward the IEP goal and short term objectives addressing reading

comprehension. Student works in a small group for reading and is not generally provided with direct instruction. (N.T. 95-107; S 9, S 10, S 11, S 17, S 18, S 19, S 20, S 23 at 1)

11. In the area of math, Student worked on the IEP goals and used the Corrective Math program. Student is making some progress toward the IEP goal and short term objectives addressing improvement of math skills. (N.T. 95, 108-13; S 9, S 13, S 14, S 15, S 23 at 1)
12. Student continues to work on the Speech/Language goals in the June 2, 2010 IEP. (S 9)
13. Student is making progress on the goal for classroom behavior in the June 2, 2010 IEP. (S 9)
14. Since the November 2010 meeting, Student's learning support teacher has worked with Student at the end of the school day a few days a week to review some of the concepts taught in the regular education classroom. (N.T. 114, 118-19)
15. Student performs inconsistently on regular education assessments, sometimes achieving failing grades. (N.T. 27-30, 42; Parent Exhibit (P) 1)
16. Student is not provided with any pre-teaching of concepts taught in the regular education classroom. (N.T. 76-77)
17. The Parents' concern with Student's educational program over the 2010-11 school year has been the level of support Student is receiving to be successful in the regular education classes. (N.T. 29-30, 41-44, 50-53, 62-63, 121)
18. By the date of the due process hearing, Student no longer had reading instruction in the regular education classroom. (N.T. 94-95)
19. At the time of the due process hearing, the District was conducting another FBA. (N.T. 91, 119)
20. The following exhibits were referenced during the hearing without objection and therefore admitted into the record:

Parent Exhibit 1

School District Exhibits 1, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

School District Exhibit 2 was also provided and was referenced indirectly as well as in S 7; therefore, this hearing officer considered it to be a part of the record.

DISCUSSION AND CONCLUSIONS OF LAW

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of

persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁴ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent. The credibility of particular witnesses is discussed further in this decision as necessary.

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). School districts are also mandated to educate *all* children with disabilities, to the maximum extent appropriate, in the regular education environment. 20 U.S.C. § 1412(5)(A). 34 C.F.R. §300.114(a)(2):

Each public agency [including a school district] must ensure that

- (i) To the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(2). To meet this obligation, school districts “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115 (a). “Supplementary aids and services means aids, services, and other supports that are provided in general education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate[.]” 34 C.F.R. § 300.42.

⁴ The burden of production, “*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324.

The issue in this case does not involve a claim that Student’s IEP failed to properly address Student’s identified needs.⁵ The Parents’ concern in this case is focused on the supports that Student is receiving for regular education class content. There appears to be no disagreement that Student needs to have concepts reviewed and reinforced. (Finding of Fact (FF) 6, 8, 14, 17; N.T. 31-32, 41-44, 50-53, 76-77) After concerns were raised about Student’s progress and struggles in the fall of 2010, the special education teacher began to work on review and reinforcement with Student, yet that opportunity was limited to time at the end of the school day and only a few days a week. (FF 14) Student is not receiving any pre-teaching of concepts. (FF 16) Even the District’s Director of Special Education testified that she had a concern that Student was not receiving appropriate support to permit Student to succeed in the regular education classroom. (N.T. 76-77) Student’s variable performance on assessments in the regular education classroom provides further indication that the support provided to Student is not sufficient to enable Student to consistently succeed in that environment. (FF 15) Furthermore, it logically follows that Student will be better equipped to meet the behavioral goal of independently completing assignments if Student is first provided with sufficient foundational content support.

Nevertheless, the evidence does not support a conclusion that Student requires a placement in a separate school. As noted, school districts are required to ensure that, to the maximum extent appropriate, children with disabilities are educated with their nondisabled peers. Districts are also obligated to provide a continuum of services, and placement in a separate school must occur only if the nature or severity of the disability is such that education in regular classes, with appropriate of supplementary aids and services, cannot be satisfactorily achieved. Here, the record supports the conclusion that Student can derive meaningful educational benefit, and can be successful, in the regular education environment, with the

⁵ There was some brief testimony that appeared to suggest that the Parents had an obligation to determine whether Student’s program was appropriate and, if they thought it was not, to take steps to meet with the District to address any deficiency. (N.T. 85-86) This concept is, of course, contrary to the law. *See M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996) (explaining that, “a child’s entitlement to special education should not depend on the vigilance of the parents.”). However, this hearing officer is not convinced that this witness’ comments were intended to place such responsibility on the Parents.

provision of an appropriate level of support. The evidence as a whole was consistent that Student simply needed more support in the regular education classes than had been provided. Stated another way, the evidence fails to demonstrate that Student must take the great leap along the continuum from regular education with supplemental aids and services to a wholly segregated placement. While this hearing officer can appreciate the Parents' well-intentioned efforts to advocate for a specialized environment for Student, simply put, they have not met the burden of establishing that a private placement is necessary to meet Student's needs.

It merits mention that there was testimony presented that the IEP team was scheduled to meet the week after the due process hearing convened. Nonetheless, to the extent it has not already done so, the District will be directed to convene the IEP team to review Student's program to consider the full range of supplementary aids and services and thereafter determine appropriate revisions to the IEP which provide the necessary supports for Student in the regular education environment.

CONCLUSION

With appropriate revisions to Student's IEP to support Student in the regular education environment, which the IEP team will determine, Student's educational program is reasonably calculated to permit meaningful educational benefit, and is less restrictive than a private placement. The Parents' request for a private placement at public expense to meet Student's educational needs must be denied.

ORDER

1. The Parents' request for a private placement for Student at public expense is denied.
2. Within 15 days of the date of this decision, the District is ordered to convene the IEP team to consider appropriate supports for Student in the regular education classes, including supplemental aids and services, consistent with the discussion above.
3. The District is not ordered to take any further action.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: April 20, 2011