

*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: D.R.

Date of Birth: [redacted]

Date of Hearing: 4/8/2015

ODR File No. 16032-14-15

Parties to the Hearing:

Representative:

Parent[s]

Parent Attorney  
None

Local Education Agency  
Penn Hills School District  
260 Aster Street  
Pittsburgh, PA 15235-3839

LEA Attorney  
Chelsea Dice, Esquire  
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Date Record Closed:

April 20, 2015

Date of Decision:

May 2, 2015

Hearing Officer:

Cathy A. Skidmore, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

The student (hereafter Student)<sup>1</sup> is a middle-elementary school-aged student in the Penn Hills School District (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> on the basis of Autism and a Speech/Language Impairment. The District filed a due process complaint after the Parent disagreed with its proposal for Student's program and placement in its own program of autistic support following the family's move from another school district.

The case proceeded to a due process hearing conducted in a single session. The District presented evidence that its proposed program and placement are appropriate for Student; the Parent did not attend, but provided written input for this hearing officer to consider. For the reasons set forth below, I find in favor of the District but will order specific directives to Student's Individualized Education Program (IEP) team.

### **ISSUE**

Whether the District's proposed program and placement is appropriate for Student.

### **FINDINGS OF FACT**

1. Student is an elementary school-aged child who current resides in the District. Student is eligible for special education as a child with Autism and a Speech/Language Impairment. (School District Exhibit (S-) 1 p. 1, S-3 p. 8)
2. Student currently attends a school (School) operated by the local Intermediate Unit (IU) where Student began attending in December 2014 when enrolled in a former school district. The IU operates three such schools, and Student attended one of its other schools

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1400-1482.

at the beginning of the 2014-15 school year. (Notes of Testimony (N.T.) 38, 42-44; S-2 p. 7, S-3 p. 2)

3. Approximately 125 students attend the School, and none are typically-developing children. Student demonstrates an interest in learning and has made progress while attending the School. (N.T. 41-44; S-3 p. 2)
4. Student was evaluated by the school district where Student resided when Student began attending the School, and a Reevaluation Report (RR) issued in February 2015. Assessment of Student's academic achievement reflected limited skills in all areas: letter-word identification, word attack, passage comprehension, reading fluency, reading vocabulary, spelling of sounds, and sound awareness. Student was cooperative and attentive during the achievement testing. (S-3)
5. Assessment of Student's adaptive functioning was assessed for the RR with the teacher version of the Vineland Adaptive Behavior Scales – Second Edition, revealing significant delays in all areas measured: communication, daily living skills, socialization, and motor skills. (S-3 pp. 3-4)
6. Speech/language assessment for the RR included the Structured Photographic Expressive Language Test – Second Edition, the Receptive One-Word Picture Vocabulary Test, and the Expressive One-Word Picture Vocabulary Test. Student demonstrated needs in the areas of receptive and expressive language including social/pragmatic language. (S-3 pp. 4-5)
7. A description of a classroom observation by an IU psychologist for the RR reported on Student's successful participation in activities and transition between activities and settings, as well as appropriate behavior and ability to follow directions. (S-3 p. 5)
8. Needs noted in the RR included development of foundational skills in pre-academic, social, math, and reading skills, as well as continued speech/language and occupational therapy. Because Student also demonstrated behaviors that impacted Student's learning (off-task behavior, prompt dependence, and self-stimulatory behaviors), the RR recommended a Positive Behavior Support Plan (PBSP) to address behaviors of concern identified in a recent Functional Behavioral Assessment (FBA). (S-3 pp. 4-6, S-4)
9. The FBA was included in the PBSP accompanying a February 2015 IEP. The hypotheses of the functions of the behaviors of concern (off-task and self-stimulatory behaviors) were to gain access to preferred items or activities or to escape/avoid non-preferred, unfamiliar, or undesirable activities or environments. (S-4 p. 3)
10. Student's current IEP was developed in February 2015 by the former school district. This IEP included information about Student from the RR with parental input. Goals addressed needs in speech/language, occupational therapy, functional mathematics skills, functional reading skills, and social skills; various program modifications and items of specially designed instruction and related services were also included. (S-2)

11. The PBSP developed at the same time as the IEP addressed Student's behaviors of concern with annual goals, program modifications, and items of specially designed instruction related to behavior. (S-4)
12. At the time that the family moved into the District, the Parent spoke with a representative of the School to ask about arranging for transportation for Student. The representative explained to the Parent of the need to register with the new school district. (N.T. 39)
13. Student was enrolled in the District in late February 2015, and the School then provided Student's IEP and RR to the District. (N.T. 45-46)
14. After Student's enrollment, the District considered a private school placement for Student in addition to a District placement. (N.T. 46-48)
15. The representative of the School had a discussion with the District Special Education Coordinator about Student after Student enrolled, and she suggested that it consider a District placement for Student based on her understanding of Student's needs. (N.T. 41-42, 47-48)
16. The District and Parent met on March 6, 2015 to discuss Student's placement. The District explained its proposal to place Student in a District autistic support program, but the Parent expressed a desire to not have Student change to a third school in the same school year. The Parent disapproved the Notice of Recommended Educational Placement (NOREP) on that same date, noting parent's desire for Student to remain at the School. (N.T. 48-50; S-5)
17. The District program would address Student's needs for improving receptive and expressive language skills, with speech/language therapy provided in a small group setting twice per week. (N.T. 15-19, 21-22)
18. The District program would provide occupational therapy services through the local IU. (N.T. 63-64)
19. The autistic support classroom to which Student would be assigned currently has eight to nine students at any one time. Kindergarten through third grade level students may be assigned to that classroom. In addition to the teacher, two paraprofessionals are assigned to the classroom who also accompany and support the students when they go to regular education classes. (N.T. 58-59)
20. Student would be provided reading and mathematics instruction by a teacher in the autistic support classroom, and science and social studies instruction in a regular education class co-taught by the regular education teacher and an autistic support teacher. One or two classroom paraprofessionals would be present in both of those environments. (N.T. 24-26, 58-59)
21. Students in the autistic support class attend regular education special classes: art, music, library, computer, and physical education. (N.T. 65-66)

22. The District's autistic support program is a very structured approach based on TEACCH principles. The program provides individualized schedules for students with activities that include work centers. (N.T. 27-28)
23. The District is able to implement Student's current IEP in its proposed placement; and, the District would convene a meeting of the IEP team to revise Student's IEP as needed within 30 days of Student entering the District program and placement. (N.T. 33-36, 53-54, 56-57, 63-67)
24. The District is willing to observe Student at the School as part of a plan of transitioning Student to its own program. (N.T. 70)
25. The Parent did not file a Due Process Complaint despite checking the box on the NOREP that requested a due process hearing. The District therefore filed its own Due Process Complaint. (N.T. 51-53, 61-63; S-1)
26. The Parent did not attend the due process hearing but provided input stating reasons for disagreeing with the District's proposal; namely, the concern with Student transferring to a third school during the same school year, and Student's success at the School where Student enjoys attending. The Parent was also provided with a copy of the District exhibits immediately following the hearing. (Hearing Officer Exhibits (HO-) 1, HO-2)<sup>3</sup>

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Principles

Generally speaking, 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); *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 District as the party 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, as fact-finders, are also charged with the responsibility of making

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<sup>3</sup> The parties were provided with copies of HO-1 and HO-2 by letter from this hearing officer on April 20, 2015 that identified both documents. HO-1 and HO-2 are hereby admitted into the record.

credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). All of the witnesses testified credibly. In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision.

### IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. Eligible students are entitled to a free, appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.101; 22 Pa. Code § 14.102. 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.

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an 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). 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. Further, a child’s educational placement must be determined by the IEP team based

upon the child's IEP, as well as other relevant factors. 34 C.F.R. § 300.116. However, the IEP need not “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012).

All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5). Critical to this principle is the IDEA obligation for eligible students to be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993).

#### The District's Proposed Program and Placement

The record supports a conclusion that the District's proposed program and placement are appropriate for Student. The District would implement the current IEP to address Student's special education needs for autistic support, speech/language and occupational therapy, and specially designed instruction. (Findings of Fact (FF) 4, 5, 6, 8, 10, 11, 17, 18, 23) Student's program would be both structured and individualized. (FF 22) Paraprofessional and other support would be provided in the regular education setting including specials. (FF 19, 20, 21) The District would convene a meeting of Student's IEP within 30 days to review Student's program and make necessary revisions based on the experiences of Student and District staff after the transition to the District placement. (FF 23) And, the proposed program and placement are less restrictive than the School along the placement continuum. (FF 3, 20, 21) In sum, the District has proposed a program that meets its obligations to Student under the IDEA.

The Parent's wish for Student to remain at the School where Student has flourished is

certainly understandable. However, while Student's success in the current program must be a consideration, the record establishes that the District is prepared to provide the services that meet the needs of Student without maintaining the placement at the School. It is also noteworthy that the School representative who testified believes that Student's needs would be appropriately addressed within the District. (FF 15) Because the District can meet Student's special education needs without maintaining the School placement, it shall not be required to continue that programming.

Nevertheless, the evidence establishes a need for a plan for Student's transition to the new program and placement. Student's PBSP reflects that Student engages in problematic behavior under circumstances that include a lack of familiarity with the environment. (FF 9) A new school building unquestionably would present as an unfamiliar setting to Student. To its credit, the District has indicated a willingness to conduct an observation of Student at the School and to develop a plan to transition Student to its own program and placement. With the end of the school year quickly approaching and the need for District staff to have an adequate opportunity to observe Student, and then hold an IEP meeting to develop a plan of transition, the final month of this school year will provide the time needed to take these necessary steps while also helping Student make the transition at a natural point in time, namely the beginning of the 2015-16 school year. The Parent is strongly encouraged to attend and participate in that IEP meeting. This hearing officer also suggests that the end of the 2014-15 school year and/or the summer months would provide an ideal opportunity for Student to become acquainted with the new school building prior to the start of the next school year.



## **CONCLUSION**

For all of the above reasons, this hearing officer concludes that the District's proposed program and placement are appropriate for Student, but that the transition should not occur prior to the end of the 2014-15 school year.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within ten days of the date of this order, the District shall arrange an observation of Student at the School.
2. Within ten school days of the observation, the parties shall convene a meeting of Student's IEP team to develop a plan to transition Student to the District's proposed program and placement at the start of the 2015-16 school year.
3. Nothing in this Order precludes the parties from mutually agreeing to alter the directives regarding the timelines set forth in this Order.

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

*Cathy A. Skidmore*

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Cathy A. Skidmore  
HEARING OFFICER

Dated: May 2, 2015