

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: B. M.

Date of Birth: [redacted]

Dates of Hearing:

January 19, 2016

January 26, 2016

February 2, 2016

March 2, 2016

March 9, 2016

March 16, 2016

CLOSED HEARING

ODR Case # 16725-1516AS

Parties to the Hearing:

Father

Representative:

Jacqueline Lembeck, Esquire
30 Cassatt Avenue
Berwyn, PA 19312

Mother

Pro Se

Unionville-Chadds Ford School District
740 Unionville Road
Kennett Square, PA 19348

Anne Hendricks, Esquire
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date Record Closed:

March 16, 2016

Date of Decision:

April 5, 2016

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is an early teen-aged student residing in the Unionville-Chadds Ford 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”)². The student has been identified under the terms of IDEA as a student with autism, an intellectual disability, and speech/language impairment.³ Parents maintain that the student’s program and placement should remain at the District based placement where the student has attended for the current 2015-2016 school year. Parents feel that the District-based placement provides the student with a free appropriate public education (“FAPE”) in the least restrictive requirement (“LRE”), as required under IDEA and Pennsylvania special education regulations.

The District counters that the appropriate program/placement for the student is an autism support classroom operated by the local intermediate unit (“IU”). The District asserts that the IU placement is not

¹ The generic use of “student” will be used, to the extent it is helpful, to protect the student’s confidentiality. Additionally and for the same reason, gender-specific pronouns will not be used.

² 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.

³ In the midst of these proceedings, additional medical information related to a seizure disorder was developed by the student’s medical providers which, going forward, may impact an understanding of the student’s medical diagnoses. (Mother’s Exhibit-1, Mother’s Exhibit-2; Notes of Testimony at 751-810.)

only reasonably calculated to provide FAPE to the student but is necessary for the student to continue to make educational progress.

For the reasons set forth below, I find in favor of the parents.

ISSUES

Should the student remain in a District-based placement, or should the student's placement be changed to the IU autism support program?

FINDINGS OF FACT

Summary Chronology

1. The student has attended District schools since 2012-2013 school year, the student's 4th grade year. Prior to that, the student had been enrolled in private school, in a charter school, and in homeschooling. (School District Exhibit ["S"]-6).
2. In June 2015 school year, the student completed 5th grade at a District elementary school. (Parent's Exhibit ["P"]-4; S-4, S-5).⁴

⁴ The student enrolled in a District elementary school in the 2012-2013 school year, in 4th grade. The student transitioned to another District based placement in the 2015-2016 school year, 6th grade. Although not clear on the record, at some point in the student's grade-to-grade progression, the student repeated a school year, either in 4th grade or 5th grade. It is not material to the decision but is noted here for clarity in the chronology. Also, exhibits prepared, and entered into the record, by father's counsel are marked as "P". The student's mother also prepared, and entered into the record, exhibits, marked as "Mother's Exhibits".

3. At that point, the student was due to transition to another District based school placement for 6th grade.
4. The District and the parents discussed the student's placement as a result of the school transition.
5. In June 2015, the District recommended an autism support classroom at an IU-based program. (S-9).
6. The parents were not in agreement with the recommendation and, in August 2015, filed the special education due process complaint which led to these proceedings.⁵ (Hearing Officer Exhibit ["HO"]-1).
7. In September 2015, the student's individualized education plan ("IEP") team met to discuss the student's educational programming in light of the student's attendance at the District based school placement.
8. In November 2015, the District issued a re-evaluation report ("RR") for the student. (S-31).
9. The initial hearing session was held in abeyance as the parties worked through the IEP and RR processes, with the hope that the dispute could be resolved with an agreement as to the student's placement. (HO-3).

⁵ The parents were initially both represented by the same attorney. Shortly after the complaint was filed, the parents' counsel withdrew their appearance. Thereafter, current counsel for the father entered an appearance on his behalf, and the student's mother proceeded on her own behalf. (HO-1).

10. Ultimately, the parties could not agree on the student's placement, and the hearing was convened in January 2016. After five evidentiary sessions and a session for oral closing arguments, this decision follows in April 2016. (HO-3).

2014-2015 School Year⁶

11. At the outset of the 2014-2015 school year, the student's IEP was in place from the prior school year. In November 2014, the student's IEP was revised. This IEP was revised again in March 2015, April 2015, May 2015, and June 2015. (S-4, S-5).
12. The student had multiple academic goals, including goals in verbal behavior manding and tacting, occupational therapy, physical therapy, social skills, and skills for independent living. The student also had a behavior goal for the reduction of self-injurious behaviors when transitioning from preferred to non-preferred activities. (S-4).

⁶ The student's IEP for the 2014-2015 school year (S-4), revised multiple times, was in place through most of September 2015. In the latter half of September 2015, and after the complaint was filed, the IEP was revised in light of the student's attendance at the District based school placement. (S-3). Evidence as to the 2014-2015 programming was developed for a sense of the nature, context, and results of that programming. As indicated, however, different programming was in place for most of the 2015-2016 school year. As such, the evidence as to the 2015-2016 programming is more probative for the questions related to the placement questions in the current school year and going forward. Still, evidence and fact-finding as to the 2014-2015 school year is presented here.

13. The student made meaningful progress on goals in the 2014-2015 IEPs. (P-4, P-5; S-22, S-28; Notes of Testimony ["NT"] at 105-170, 574-625, 901-941).
14. At times, but consistently over time, the student engaged in crying, spitting, throwing items, and self-injurious behaviors. The student also exhibited aggressive behaviors toward teachers and staff, resulting in multiple referrals of teachers/staff to the school nurse for documentation or treatment. (S-14, S-17, S-18, S-23, S-24; NT at 105-170, 227-384, 668-703).
15. Over the course of the 2014-2015 school year, the student was consistently included in classes and activities with regular education peers, including homeroom, art, physical education, music, computer, and lunch. (S-13).
16. In June 2015, the District, anticipating the student's transition to the District based school placement, recommended an autism support classroom at an IU-based program. (S-9).
17. Parents resisted the placement, seeking to have the student remain in a District-based placement. (NT at 946-1043).
18. The IU-based placement is located at an IU facility and offers programming for students with a broad range of disabilities. The District recommended, in consultation with the IU, a placement in an IU-based autism support classroom. (NT at 465-568).

19. The student's academic programming at the IU placement would differ from the academic instruction at the District. At the IU facility, the student would have no access to regular education peers. (S-3, S-29; NT at 465-568).
20. The District arranged for the student's acceptance at the IU program, and parents visited the IU facility. Parents maintained their opposition to the placement. (S-26; NT at 227-384, 946-1043).
21. In August 2015, parents filed the complaint which led to these proceedings. (HO-1).

2015-2016 School Year

22. The student had multiple academic goals, including goals in verbal behavior manding and tacting, occupational therapy, physical therapy, social skills, and skills for independent living. The student also had a behavior goal for the reduction of self-injurious behaviors when transitioning from preferred to non-preferred activities. (S-3).
23. The student made meaningful progress on goals in the 2015-2016 IEP. (P-2; S-12, S-19, S-33, S-36, S-37; NT at 62-105, 227-384, 574-625, 631-656, 704-740, 816-889).
24. As in the prior school year, the student engaged in crying, spitting, throwing items, and self-injurious behaviors. The student

also continued to exhibit aggressive behaviors toward teachers and staff, again resulting in multiple referrals of teachers/staff to the school nurse for documentation or treatment. One teacher took leave related to an incident where, after a headbutt by the student to the teacher's jaw, she experienced concussion-like symptoms. (S-16, S-23, S-24, S-34, S-35; NT at 62-105, 227-384, 574-625, 668-703, 816-889).

25. Over the course of the 2015-2016 school year, the student was consistently included in classes and activities with regular education peers, including homeroom (at the school referred to as "advisory period"), art, physical education, computers, family/consumer science, and lunch. (S-12, S-15, S-20, S-41, S-42; NT at 43-57, 62-105, 574-625, 668-740, 816-889).

Credibility of Witnesses & Weight Accorded to Testimony

26. All witnesses testified credibly.
27. The heaviest weight was accorded to the testimony of the parents and the testimony of those who have worked directly with the student in educational environments. One exception here is the weight accorded to the student's special education teacher who began her duties in January 2016; that person, while directly instructing the student, had been teaching the student for approximately three weeks when she testified. Given that, her

testimony was accorded a modicum of weight. (NT at 43-57, 62-105, 105-170, 574-625, 631-656, 668-703, 704-740, 816-889, 901-941, 946-1015, 1016-1043).

28. A moderate amount of weight was accorded to the testimony of witnesses who work directly with the student in a programmatic way, although not in educational environments, and to witnesses who have knowledge of, background in, and/or experience with educational programming that might impact the student even though those individuals have not worked directly with the student. (NT at 175-214, 227-384, 394-459, 465-568).

29. Less weight was accorded to the testimony of witnesses who do not work with the student in a programmatic way, or who have no knowledge of, background in, and/or experience with educational programming that might impact the student. (NT at 751-810).

DISCUSSION AND CONCLUSION OF LAW

To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be “reasonably calculated to yield meaningful educational...benefit and student or child progress.” (Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982)). “Meaningful benefit” means that a student’s program affords the student the opportunity for

“significant learning” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress (M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).

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 (34 C.F.R. §§300.114-120; 22 PA Code §14.145; Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993)). 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 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.” (34 C.F.R. §300.116(c)).

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 (22 PA Code §14.145(3)). 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.” (22 PA Code §14.145(4)).

In this case, the record strongly supports a finding that the student has made progress in the District-based school placement in the 2015-2016 school year, that continued provision of the student’s educational programming in the District-based placement is reasonably calculated to provide FAPE in the LRE, and that the IU-based autism support program would be overly restrictive.

Over the 2015-2016 school year, on a broad range of goals, the student has made progress in the current District-based placement. Two factors in particular, though, support a finding that this progress in the District-based placement is in the LRE. First, the student has regular class time, and non-instructional time such as advisory period and lunch, with regular education peers. The opportunity for such experiences, which are as valuable to those regular education peers as they are for the student, do not exist at the IU-based placement. Second, nothing in the testimony of the teachers, staff and related services

providers who work with the student indicates that the work they do with the student is not effective, or cannot be provided in a District-based placement/can only be provided in an IU-based placement. Indeed, the student's behaviors often led to contact with those providers that would sometimes lead to scratches, or bruising, or even concussion-related symptoms. These are serious matters; yet those witnesses all noted that they were able to work with the student on goal-oriented instruction and services. It is to their credit that those witnesses voiced that, even given such difficulties, they enjoyed working with the student and recognized their success in the student's progress.

Accordingly, the LRE for the student is the District-based placement, where the student has gained meaningful education benefit from the educational programming in the 2015-2016 school year.

CONCLUSION

The District placement at the District school where the student has attended in the current 2015-2016 school year is appropriate. The student has gained meaningful education benefit while in the placement, and continued provision of the student's educational programming in the District-based placement is reasonably calculated to provide FAPE in the LRE. The IU-based placement would be, on this record, overly restrictive.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student's placement shall remain at the District-based placement at the District school where the student has attended in the 2015-2016 school year.

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

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

April 5, 2016