

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: C. D.

Date of Birth: [redacted]

Date of Hearing: August 19, 2016

CLOSED HEARING

ODR Case # 17952-1516KE

Parties to the Hearing:

Parent[s]

Quakertown Community School District
100 Commerce Drive
Quakertown, PA 18951

Date of Decision:

Hearing Officer:

Representative:

Frederick Stanczak, Esq.
59 Creek Drive
Doylestown, PA 18901

Mark Walz, Esq.
331 East Butler Avenue
New Britain, PA 18601

August 25, 2016

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a late teen-aged student who resides in the District. The student is eligible as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)², namely as a student with multiple health impairments and a speech/language impairment. The parties’ dispute in this matter centers on the appropriate program for the 2016-2017 school year. The parents maintain that the District’s proposed District-based program is inappropriate. The District maintains that the proposed program is appropriate and, as such, has complied with its duties under federal and Pennsylvania law to offer the student a free appropriate public education (“FAPE”).

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

ISSUES

Is the District’s proposed program for the 2016-2017 school year appropriate?

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

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. *See also* 22 PA Code §§14.1-14.162.

FINDINGS OF FACT

1. The student has been diagnosed with attention deficit hyperactivity disorder (“ADHD”), speech/language disorder, autism spectrum disorder, and mixed developmental delays. The student also has a medical diagnosis of [a genetic] syndrome which impacts the student’s physical, language, and social development. (Parents’ Exhibit [“P”]-5; School District Exhibit [“S”]-2).
2. In May 2014, as the result of a prior round of special education due process, the parties entered in an agreement through which the District funded a private placement for the student for the 2014-2015 and 2015-2016 school years. (S-1).
3. As part of the agreement, the parents provided consent to the District to conduct a multidisciplinary evaluation of the student in the spring of 2016. The parties agreed that over the course of the spring of 2016, the student’s individualized education program (“IEP”) team would meet to design an IEP for the student. (S-1).
4. The agreement also spelled out that, should any dispute arise between the parties regarding the student’s educational placement and/or program, the student’s pendent placement would be the programming offered by the District. (S-1).
5. In early March 2016, as outlined in the agreement, the District issued a re-evaluation report (“RR”) for the student. (P-5; S-3).

6. In late March 2016, the student's IEP team met to design the student's IEP. (S-5).
7. In May 2016, the proposed IEP was revised, including extended school year ("ESY") programming for the summer of 2016, and formally offered with those revisions to the parents through a notice of recommended educational placement ("NOREP").³ (S-8, S-9).
8. The May 2016 IEP identified the following needs for the student: reading skills, writing skills, processing/fluency speed, pragmatic language (for effective communication with peers and teachers), sensory processing, executive functioning/organization skills, coping skills for anxiety/depression. (S-8 at page 24).
9. The May 2016 IEP contained eleven goals: one in reading, two in language arts, two for organization skills, two for the student's behavior, and four in speech/language. (S-8 at pages 39-51).
10. The revisions in the May 2016 IEP arose mainly out of information from a private behavioral health provider shared with the District by parents. The information indicated that the student was experiencing elevated anxiety and depression, potentially

³ The issue of the appropriateness of the District's proposed ESY program for summer 2016 was placed at issue in a separate special education due process proceeding, with a decision issued on July 13, 2016 at 17881-1516KE. (See Hearing Officer Exhibit ["HO"]-1).

- related to an anticipated return to the District from the private placement. (P-3; S-8 at page 2; Notes of Testimony [“NT”] at 186).
11. As a result of this information, the May 2016 IEP revisions included transition planning for a potential return to the District, revisions to the proposed positive behavior support plan, and counseling services. (S-8).
 12. The May 2016 IEP would be implemented in the school—the District high school—where the student would attend if not identified with a disability. The student’s placement would be in the regular education environment for 57% of the school day, with specially designed instruction delivered in special education environments for reading, writing, and mathematics instruction, organizational skill-building, and related services (speech/language therapy, occupational therapy, counseling); social studies instruction and electives would be delivered in the regular education environment. (S-8 at 66-68).
 13. The student has a history of elopement, both by hiding in school locations (primarily [certain rooms]) and by leaving the school building. At the private placement, the student left the school building three times during the 2014-2015 school year. The administrator at the private placement testified credibly that this elopement seemed to be related to the student’s anxiety at being in

a new educational placement. There was no elopement in the 2015-2016 school year. (P-10, P-11; NT at 21-32, 120, 122-126).

14. In the summer-2016 ESY program at the District, the student exhibited elopement, or was unaccounted for, multiple times. (P-8; NT at 27-30).
15. During the summer-2016 ESY program, the student's parents requested a copy of the student's class schedule multiple times. On August 3, 2016, a draft copy of the schedule was provided. At the time the record closed, on August 19, 2016, the student's schedule had still not been finalized. The District high school has nine distinct periods, with students released to the hallways to pass between classes at the end of each period. (P-7, P-9; NT at 189-190, 198-201).
16. The private placement where the student attended the 2014-2015 and 2015-2016 school years has approximately 265 students, across the K-12 spectrum and including students aged 18-21 years. The District high school has approximately 1,500 students, grades 9-12. (NT at 107-108, 191).
17. The student's IEP at the private placement was crafted by the student's IEP team in November 2015 and is designed for implementation through November 2016. (P-1; S-2).

18. The student has made meaningful progress at the private placement over the most recent school year, 2015-2016. (P-12, P-13).
19. In June 2016, the parents rejected the May 2016 NOREP and filed the special education due process complaint which led to these proceedings. (S-9).⁴
20. The testimony of the administrator at the private placement as to the student's needs generally, and concerns about the District high school environment vis a vis elopement particularly, were accorded heavy weight. (NT generally at 105-178, and particularly at 134-138).

DISCUSSION AND CONCLUSIONS 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 to the student. Board of Education v. Rowley, 458 U.S. 176, 187-

⁴ In a prehearing communication to counsel on June 28, 2016, this hearing officer indicated to parents' counsel that a prospective placement would not be available to them and that the appropriate remedy would be compensatory education. (HO-2). Based on this record, and as set forth below, the health/safety concerns related to elopement lead this hearing officer to assign pendency to the private placement. This hearing officer continues to hold the view that prospective placement is not a regularly available remedy for families under IDEIA; the available remedies are tuition *reimbursement* (34 C.F.R. §300.148(c), emphasis added) should a family undertake a private placement, or equitable compensatory education for failure of a school district to provide FAPE under the terms of an IEP (*see, e.g., G.L. v. Ligonier Valley School Authority*, 801 F.3d 602 (3d Cir. 2015), M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)). The situation presented on this record, however,—one of the health/safety of the student—leads this hearing officer to utilize his authority under 34 C.F.R. §300.518(d) to change the pendent placement of the student until the IEP team has addressed prejudicial flaws in the student's IEP.

204 (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)).

In this case, the District has proposed an IEP that is appropriate in most regards. Where it is not appropriate, however, it is a prejudicial flaw, namely that the student’s history of elopement, especially when transitioning to new educational environments, is not addressed. On this record, the student would be largely unsupervised in unstructured settings in a large public high school setting. The student’s pattern, over most of the student’s educational career, is that the student elopes, hiding away from assigned settings and, at times, leaving the school building. This behavior was present only a few weeks ago during the District’s summer 2016 ESY program. Given the size of the environment, the difficulty the student has with transitions to new environments, and the lack of clarity, even at this late date of exactly where the student will be and what the period-to-period transition would look like for the student, the IEP is not reasonably calculated to ensure basic safety for the student in the District high school.

Accordingly, via hearing officer order, the student’s pendent placement shall be the private placement where the student has attended

in the prior two school years until an appropriate IEP has been proposed.
This pendent placement shall be at public expense.

CONCLUSION

The May 2016 IEP proposed for the 2016-2017 school year is inappropriate. Under the terms of this order, the student's pendent placement shall be the private school where the student has attended for the 2014-2015 and 2015-2016 school years. This placement shall be at public expense, as outlined in the order below, until the District has proposed an appropriate program.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the student's 2016-2017 placement shall be at public expense at the private placement where the student has attended the 2014-2015 and 2015-2016 school years until an appropriate IEP is proposed. The ancillary provisions of the May 2014 settlement agreement between the parties related to this placement (e.g., transportation, conditions upon the family moving out of the District, etc.) shall remain in effect during this pendency.

This placement is made, and pendency changed, based on the evidentiary record in this matter and under a hearing officer's authority pursuant to 34 C.F.R. §300.518(d).

Michael J. McElligott, Esquire

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Special Education Hearing Officer

August 25, 2016