

*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

ODR No. 2027-1011 AS

Child's Name: D.M.

Date of Birth: [redacted]

Date of Hearing: 8/16/11

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Parent[s] Attorney

None

School District

Centennial  
433 Centennial Road  
Warminster, PA 18974

School District Attorney

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Date Record Closed:

August 22, 2011

Date of Decision:

September 1, 2011

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The primary issue in this case is whether the District's proposal to assign Student to a supplemental life skills support program for the 2011/2012 school year is appropriate. Student is entering middle school, where there is no hearing support program, the special education placement to which Student had been assigned throughout elementary school.

Parents' June 22, 2011 due process complaint alleges that the District's placement proposal was based upon administrative convenience due to the lack of a hearing support program at the middle school level rather than upon Student's needs. Parents are particularly concerned that the District's proposal significantly reduces the hearing support services Student has received in the past, is not academically suitable and provides fewer opportunities for inclusion with non-disabled peers. Parents suggested that if the District is not required to create a middle school hearing support class, Student should be placed in either a learning support or autistic support program.

A one session hearing was conducted in this matter on August 16, 2011. Although Parents understandably want an educational placement in which Student has the opportunity to thrive, they conceded at the hearing that Student is likely to succeed in the District's proposed placement. Based upon the evidence and the applicable legal standards, Parents did not establish that the District's proposal is inappropriate for Student. Moreover, the District provided ample evidence suggesting that Student is likely to do very well in the proposed life skills program, and even to thrive in that setting. Consequently, Parents' claims in this matter are denied and the District is permitted to implement its proposed program and placement for the 2011/2012 school year.

## ISSUE

Has the School District proposed an appropriate special education program and placement for Student for the 2011/2012 school year, including

- a. sufficient opportunities for inclusion with non-disabled peers;
- b. a sufficient level of hearing support services?

## FINDINGS OF FACT

1. Student is an [early teen-aged] child, born [redacted]. Student is a resident of the School District and is eligible for special education services. (Stipulation, N.T. p. 18)
2. Student has current diagnoses of hearing impairment and visual impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(5), (13); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 18, 19)
3. Student is described by teachers and other staff as nice, friendly, respectful and a pleasure to have in class. (N.T. pp. 43, 75, 95; J-9)<sup>1</sup>
4. Student uses and benefits from bi-lateral hearing aids and learns/communicates both with spoken/written language and sign language.<sup>2</sup> Student's communication skills and learning are enhanced by the use of sign language along with spoken language. (N.T. pp. 45—47, 106, 107, 164, 165, 187—189; J-4, J-12)
5. Student's sensory impairments, language difficulties, limited retention, cognitive ability measured in the borderline range, attention difficulties and difficulty with abstract concepts/concept development significantly and adversely affect Student's ability to make academic progress. (N.T. pp. 37, 43, 47, 48, 95—97, 182; J-5, J-12, J-15)
6. Student struggles to maintain motivation for academic tasks and needs significant prompting and extrinsic rewards, such as working for a break, to complete school work. (N.T. p. 101; J-5, J-9)
7. During the 2010/2011 school year and prior elementary school years, Student received instruction in basic academic skills (language arts, math) in a hearing support classroom operated by the local Intermediate Unit in a District elementary school. (N.T. pp. 44, 45, 98; J-5, J-15, J-16)

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<sup>1</sup> Commendably, the parties submitted joint exhibits in this matter, which avoided an unnecessarily long documentary record. The exhibits are designated by the letter "J" followed by the exhibit number.

<sup>2</sup> Student uses a sign language method known as sign supported speech, which follows the word order and syntax of spoken/written English. Student has not learned American Sign Language (ASL), a separate language with its own rules of grammar and syntax. (N.T. pp. 71—73, 106, 108, 109, 188)

8. Academic instruction in the hearing support classroom was delivered by a hearing support teacher primarily on a 1:1 basis because there were no other students assigned to the hearing support class who were consistently at the same academic levels. (N.T. pp. 63, 64, 112, 181)
9. Student was provided with modified reading instruction based on two curriculum programs designed for early readers. Although Student was strong in finding key words, comprehension as measured by re-telling a story and questions about stories that required concept formation or inference remained areas of significant weakness. At the close of the 2009/2010 school year, Student was performing at the 1<sup>st</sup> grade level in reading and spelling. N.T. pp. 114—129, 186; J-12, J-21, J-23, J-24, J-25)
10. Student's writing instruction focused on basic sentence structure and writing complete sentences. The hearing support teacher also used a structured English grammar curriculum designed for students with hearing impairments. Student remained on approximately a 1<sup>st</sup> grade level for writing at the end of the 2010/2011 school year and was unable to write a complete sentence without prompting. (N.T. pp. 130, 131)
11. During the 2009/2010 school year, Student was performing at the 2nd grade level in math. Student worked on identifying coins and their value, telling time to the hour and half hour and basic addition and subtraction using the concrete "Touch Math" system. Multiplication was attempted, but was not pursued because the concept proved to be too abstract. Student needs significant 1:1 assistance and prompting to complete math problems successfully. (N.T. pp. 135—147; J-12, J-22)
12. Although Student made significant gains during the elementary school year, social skills development and pragmatic language skills are also areas of significant need for Student, who does not initiate peer interactions. (N.T. pp. 102, 160, 184, 185; J-5)
13. Middle school in the District begins with 6<sup>th</sup> grade. For a number of reasons, including a lower incidence of hearing loss in recent years, cochlear implants and other technology that allows more children with hearing impairments to develop better language skills at earlier ages and be included in regular classrooms and/or placed in other types of special education support programs, the need for hearing support classrooms has decreased in recent years. As a consequence of the diminished need for hearing support programs, the District, the local Intermediate Unit (IU) and neighboring school districts/IUs do not maintain hearing support classes at the middle school level. (N.T. pp. 50—60)
14. In preparing for Student's change to a different type of special education placement in middle school during the 2011/2012 school year, Student's IEP team considered an approved private school for deaf/hearing impaired students, but that placement was rejected as too restrictive. (N.T. pp. 63, 193; J-13)
15. Student's IEP team also considered a learning support classroom, which the hearing support teacher visited. The IEP team concluded that the learning support class would not be appropriate for Student because instruction is delivered at a faster pace and at a

- higher level than Student could comprehend. Since the students in the middle school learning support classroom are at higher levels than Student in reading, writing, math and language skills, academic instruction in that classroom would again need to be delivered on a 1:1 basis and there would be fewer opportunities for social interactions. (N.T. pp. 63, 130, 176—178, 192)
16. Because there are other students at the same cognitive/academic levels and with similar language skills in the District's middle school life skills program, Student can participate in group instruction for reading, writing and math, which will increase Student's opportunities for social interactions and development of social skills throughout the school day. There is also a sign language club at the school proposed for Student, since many of the elementary hearing support students are placed at that school. (N.T. pp. 60—62, 64, 65, 78, 129, 195)
  17. Student's hearing support teacher also visited the life skills program and believes that it will be appropriate for Student. The life skills curriculum provides significant opportunities for hands-on learning experiences and development of functional and pre-vocational skills that will benefit Student. (N.T. pp. 132, 133, 194)
  18. The hearing support teacher consulted with life skills support staff for ideas to motivate and instruct Student, and successfully incorporated similar techniques in the hearing support classroom. Student enjoyed and did particularly well with hands-on, functional approaches to learning, particularly with respect to concept development. (N.T. pp. 156—160)
  19. The life skills class proposed for Student is expected to include 8 students from 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grades, all functioning at between a kindergarten and 2<sup>nd</sup> grade level. Under the proposed IEP, Student is to receive instruction in reading, writing, math, science and social studies in the life skills classroom with a modified general education curriculum and will be provided with a 1:1 instructional aide. Student is to be included with non-disabled peers for app. 100 minutes/day for lunch and exploratory classes—art, music, computer and Family and Consumer Science. (N.T. pp. 193, 196; J-12)
  20. The proposed IEP includes an hour of direct hearing support services daily. An itinerant hearing support teacher will provide instruction to Student primarily in the areas of reading, writing, speech reading skills, sign language and listening comprehension and will work with the life skills support teacher to address the language and other issues s/he is likely to encounter in meeting Student's instructional needs. (N.T. pp. 74,75, 79—81, 133, 134, 153; J-12)
  21. During the 2009/2010 and 2010/2011 school years, Student participated in science, social studies and specials (library, art, music, gym) in the regular education setting, accompanied by a sign language interpreter who worked with Student and one other hearing impaired child. The primary role of a sign language interpreter is to interpret the classroom teacher's spoken language, not to provide tutoring. (N.T. pp. 67, 98, 100, 103, 104, 109—111)

22. The District's IEP proposal for the 2011/2012 school year does not include a sign language interpreter. Data collected by the interpreter during the 2010/2011 school year demonstrated that due to Student's attention difficulties and limited comprehension, Student required nearly constant physical prompting to attend to the interpreter. Student's IEP team concluded that a 1:1 instructional assistant with good signing skills who could primarily provide tutoring would better meet Student's needs. (N.T. pp. 67—69, 85—92, 109—111, 167)
23. A formal assessment of Student's ability to use sign language conducted during the 2010/2011 school year confirmed that Student's signing skills are at a basic level and not at the sophisticated level provided by a sign language interpreter. (N.T. pp. 165, 166, 187, 188; J-4)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### Parents' Claim

The dispute between the parties in this case is very limited, involving primarily Student's placement for the upcoming school year. Parents' underlying concern is that the District's proposal for Student's middle school special education placement was not based on a full consideration of Student's needs and abilities. Although Parents requested in the complaint that the District create a hearing support program at the middle school level for Student, by the hearing date they recognized that such an outcome was unlikely and instead requested a placement that they believe will provide more of a challenge and push Student to higher achievement levels than Student is likely to achieve in a life skills support program. (N.T. p. 198)

### Legal Standards

Before considering the parties' contentions in light of the record that was compiled in this case, it is helpful to set out the legal framework that governs consideration of the issues in dispute.

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 251 (3<sup>rd</sup> Cir. 2009); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995).

The IDEA statute and regulations also provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be

resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009)

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, the most important aspect of the burden of proof.

The Court limited its holding *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence, the second aspect of the burden of proof. The wisdom of not specifying which party should have the obligation to present evidence first is apparent in this case, where the parties very sensibly agreed that the District would question its own witnesses first. That procedure, along with the submission of joint exhibits, resulted in an efficient hearing and concise record.

Because Parents challenged the appropriateness of the District's proposed program/placement for the 2011/2012 school year, they still had the obligation to establish that the District's proposal is not reasonably calculated to assure that Student will receive a meaningful benefit in accordance with the applicable legal standards. Pennsylvania federal courts have generally required proof by a preponderance of the evidence to meet that burden, *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

In this case, Parents could not meet their burden of persuasion. There was ample evidence presented by the District to establish that its proposal to assign Student to a middle school life skills support class is reasonably calculated to assure that Student will continue to make meaningful progress. Parents inadvertently conceded that point in stating that "We think that [Student] would probably succeed in a life skills placement. But that's all [Student] would



do is just succeed. We would like for [Student] to thrive.” (N.T. p. 198, l. 6-10) Although it is certainly understandable that caring and committed parents, as in this case, would much prefer a placement in which a disabled student can surpass a basic level of success, as noted above, school districts are not obligated to provide the best possible placement. Moreover, although Parents raised legitimate concerns, the District, through staff who testified at the hearing, was able to answer all questions about the life skills support placement and explain very well why it is not only appropriate for Student, but is likely to exceed the basic floor of opportunity the District is required to provide for Student.

#### The Districts Proposal—How/Why It Is Appropriate

The record in this case establishes that contrary to Parents’ concern that life skills support was proposed as, in essence, a “default” placement, the District carefully considered the type of special education program and placement that would best meet Student’s significant academic, social and language needs, and explored other possibilities, including the learning support program favored by Parents. (FF 14, 15)

It must be noted, first, that although Student received academic instruction in a hearing support classroom during elementary school, Student received 1:1 instruction almost entirely because no other students assigned to the hearing support program were on a similar academic level. (FF 8) As required by IDEA, the District provided academic instruction based on Student’s needs rather than on the placement designation, and Student’s disability-related academic needs were met very well, but that was due to the instruction provided by the hearing support teacher, not to the fact that the instruction was provided in a hearing support classroom. One to one instruction could have been delivered in any setting by a hearing support teacher.

Consequently, there is no basis for concluding that the lack of a middle school hearing support program will adversely affect Student's progress.

Parents also expressed a concern that the level of hearing support services will be reduced, but the record suggests quite the opposite. Because Student will have an instructional aide with signing skills who can provide tutoring, Student will continue to receive 1:1 assistance with material presented by both voice and signing, the instructional mode found most successful for Student. (FF 4, 19, 22) Student will also continue to receive daily instruction from a hearing support teacher. (FF 20) The life skills support placement, therefore, will provide all of the advantages of the hearing support program in terms of constant support for Student's primary disability, as well as additional instruction from the life skills teacher.

The District also provided both a reasonable basis for not continuing to provide Student with a sign language interpreter and appropriate substitute services that are better suited to meeting Student's needs, especially for tutoring assistance. (FF 21, 22, 23)

Student's functional needs include increased social interactions and development of better social skills. (FF 12) According to the District's uncontradicted testimony and the relevant documents, Student had little social interaction with higher functioning peers in the hearing support classroom, despite sharing a similar sensory impairment and presumably some of the language and communication issues arising from hearing loss. (FF12) There is no reason to believe that Student would become more socially interactive in a learning support classroom where the students have dissimilar disabilities and are also functioning at a higher academic level than Student. (FF 15)

Despite placement in a program in elementary school designed for students with a hearing disability, Student had no opportunity for group instruction with peers functioning at a

similar academic level, but that opportunity will be provided in the life skills support program, where the other students are functioning at a similar academic level. (FF 8, 16)

In addition to having a learning peer group in the life skills support program, Student will be provided with the type of hands-on functional instruction to which Student responded well in the hearing support classroom. (FF 17, 18) Although Parents suggest that Student will be spurred to higher levels of achievement if placed with students at a higher academic level, nothing in the record supports that proposition. The supervisor of the hearing support program noted that Student often appeared unaware of others in the classroom and the surroundings. (N.T. pp. 76, 77) That situation may continue, but it is also possible that Student will exhibit more interest in the class and peers when provided with higher interest activities. The hearing support teacher's description of Student's interest in making a milkshake as part of one reading activity (N.T. p.159 ) suggests that Student may be considerably more motivated to take an active interest in learning that is not purely academic. Student is also likely to have more opportunities to experience success in the life skills support classroom and be positively affected by demonstrating skills at the same level as classroom peers.

Parents' final area of concern was whether Student would have sufficient opportunity for inclusion with typical peers, but also recognized that such opportunities may be limited to specials. (N.T. pp. 23, 24) The IEP provides for that level of inclusion. (FF 19)

Parents did not really challenge the credibility or factual accuracy of any of the testimony from the District witnesses, and all of the documents on which the District relied were school records that Parents accepted as accurate. The record establishes that Student's needs are significant in every aspect related to school functioning, including academic, social and

communication skills. (FF 5) Student also has significant problems with attention, concept formation, retention of learned material and motivation. (FF 5, 6) The District's proposal for a middle school life skills support program for the 2011/2012 school year is a reasonable means of meeting Student's needs and providing a reasonable opportunity for achieving meaningful progress. Parents' subjective belief that Student would experience greater success in a more challenging setting, however sincere and grounded in their knowledge of their child, is simply not enough to overcome the District's overwhelming objective evidence that supports its program/placement proposal.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby

#### **ORDERED that**

1. Parents' claims in this matter are **DENIED**;
2. The School District is permitted to implant its proposed program and placement for Student during the 2011/2012 school year.

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

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

September 1, 2011