

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 Due Process Hearing Officer

**Final Decision and Order
ODR No. 22252-18-19
CLOSED HEARING**

Child's Name:
A. D.

Date of Birth:
[redacted]

Date of Hearing:
08/01/2019

Parent:
[redacted]

Counsel for Parent:
Pro Se

Local Education Agency:
Central Dauphin School District
600 Rutherford Road
Harrisburg, PA 17109

Counsel for the LEA:
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Hearing Officer:
Brian Jason Ford, JD, CHO

Date of Decision:
08/20/2019

Introduction and Procedural History

This special education due process hearing concerns the educational rights of a child with disabilities (the Student). The Student lives with the Student's parent (the Parent) within the Student's local school district (the District).¹ The Parent and the District agree that the Student is a "child with a disability" as defined by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*²

The Parent requested this hearing to resolve disputes with the District about the Student's grade level and special education placement during the upcoming 2019-20 school year.

The Parent filed her complaint on May 22, 2019. The District filed a sufficiency challenge on May 31, 2019. I issued a sufficiency determination on June 10, 2019.³ Although the sufficiency determination speaks for itself, for context I found that the complaint was sufficient in regard to three issues that the Parent presented. I explained that I would only hear those three issues, but gave the Parent leave to file an amended complaint if the Parent wished to present other issues. The Parent did not file an amended complaint.

I convened an evidentiary hearing on August 1, 2019. One of the three issues in the Parent's complaint concerned the amount of time that the Student will spend in regular education classes. At the outset of the hearing, it became clear there was a misunderstanding on the Parent's part about the level of inclusion that the District offered for the 2019-20 school year. The District explained what it had offered, that explanation matched descriptions of the Student's placement in the Individualized Education Program (IEP), and the Parent confirmed that the District was offering a satisfactory level of inclusion. In light of this, I made an on-the-record determination that the issue was moot. NT 44, 61. The remaining two issues concern the Student's grade level.

Both parties presented their cases and rested during the hearing session. At the conclusion of the hearing, the Parent chose to send a written closing statement in lieu of an oral closing statement. I received written closing statements from both parties before the August 16 deadline that I set during the hearing.

After careful review of the record, I find that the record of this case does not establish my authority to change the Student's grade level. I dismiss the Parent's complaint on that basis.

Issues

The Parent sufficiently pleaded three issues. During the hearing, I held that one of the issues is moot. The two remaining issues are:

1. Should the District place the Student into 11th grade at the start of the 2019-20 school year?
2. Should the District revise the Student's IEP to anticipate the Student's graduation with the Student's age-based peer group?

¹ Except for the cover page of this decision and order, identifying information is omitted to the greatest extent possible.

² The definition of a "child with a disability" is found at 20 U.S.C. § 1401(3)(A).

³ As a technical matter, my sufficiency determination was issued five days after an IDEA deadline for making sufficiency determinations. *See* 20 U.S.C. § 1415(c)(2)(D). Difficulty corresponding with the Parent slowed the process. Regardless, neither party objected to the sufficiency determination or the process by which it was issued.

Findings of Fact

I carefully reviewed all of the evidence and testimony that was presented during the hearing. This includes testimony from the Parent that was taken out of order. For context, the Parent called herself as the first witness. I determined to leave the Parent under oath after the Parent concluded her testimony so that I could use the Parent's statements made at any point during the hearing for fact-finding. I also gave the District an opportunity to cross-examine the Parent regarding any such statements.

I make findings of fact only as necessary to resolve the issues before me. Consequently, not all evidence and testimony presented are specifically referenced herein.

I find as follows:

Background

1. There is no dispute that the Student was retained twice in early elementary grades. Thus the Student is two grade levels behind most same-aged peers. NT *passim*.⁴
2. There is no dispute that the Student is a "child with disability" as defined by the IDEA. Specifically, the Student qualifies for special education as a child with a Specific Learning Disability (SLD) and Other Health Impairment (OHI).⁵ The Student's OHI designation is a function of the Student's Attention Deficit Hyperactivity Disorder (ADHD). *See, e.g.* S-2.
3. The Student enrolled in the District during the 2014-15 school year as a 5th grade student.
4. The District promoted the Student to the next grade level every year since the 2014-15 school year. As a result, the 2017-18 school year was the Student's 8th grade year.

2017-18 School Year (8th Grade)

5. The District reevaluated the Student during the 2017-18 school year. The reevaluation included a review of the Student's records and prior testing. The District drafted a Reevaluation Report (RR) and provided it to the Parent on March 29, 2018. S-1.
6. On April 12, 2018, the District convened the Student's IEP team. The District drafted an IEP for the Student based on the RR, and presented the IEP to the Parent. S-2.
7. On May 17, 2018, the District proposed revisions to the Student's IEP. S-4.
8. The District promoted the Student to 9th grade at the end of the 2017-18 school year.

Summer 2018

⁴ NT, or Notes of Testimony, refer to the transcript. S-# refers to the School District's exhibits. The Parent came to the hearing with documents that were not disclosed in accordance with IDEA disclosure rules. The District objected to all such documents, and I sustained the District's objection. I also explained to the Parent, in deference to the Parent's *pro se* status, that I would reconsider my decision if entering any particular document was necessary for a fair hearing. A discussion about some of the Parent's documents followed at a few points during the hearing, but the Parent did not offer any documents into evidence.

⁵ Statutory definitions of child with a disability, SLD, and OHI are found at 20 U.S.C. § 1401.

9. On July 13, 2018, the Parent requested a special education due process hearing against the District raising claims about the Student's IEP, among other issues. *See* ODR No. 20975-1819AS. Coincidentally, I was assigned as the hearing officer for that matter.

2018-19 School Year (9th Grade)

10. On September 4, 2018, I dismissed ODR No. 20975-1819AS after the parties reported they had resolved their dispute.
11. On March 18, 2019, the District invited the Parent to an IEP team meeting to develop an annual IEP for the Student and to discuss transition planning. The meeting was scheduled for April 11, 2019. S-8.
12. On April 11, 2019, the Student's IEP team met as scheduled. S-10. The Parent participated by phone. S-8. The District proposed an IEP that continued the May 17, 2018 IEP for the remainder of the 2018-19 school year, and then extended similar services into the upcoming 2019-20 school year. The proposal would increase the Student's time in regular education classes during the 2019-20 school year. S-10.
13. The April 11, 2019 IEP was proposed with a Notice of Recommended Educational Placement (NOREP). The Parent did not return the NOREP or otherwise reject the IEP. Consequently, on April 22, 2019 (11 days after issuance), the District marked the NOREP as approved. S-11.
14. On April 23, 2019, the Parent wrote to the District expressing unspecified objections to the IEP. That prompted a conversation between the Parent and District personnel. S-12, S-13.
15. On May 3, 2019, the District wrote to the Parent, seeking the Parent's consent to reevaluate the Student. The District explained that information shared by the Parent prompted its request to reevaluate, and that the reevaluation would be used to adjust the Student's IEP. The District used a form to request the Parent's consent for a reevaluation. S-13, S-14.
16. On May 9, 2019, the Parent denied consent for a reevaluation by completing and returning the District's form. On the form, the Parent checked a box indicating that the Parent wanted a due process hearing to resolve the issue. The form indicates that checking the box does not initiate a hearing, and that hearing requests must be submitted to ODR. S-14.
17. The Parent included a two-page letter with the form. The letter listed several issues, all of which are similar to those presented in the current due process complaint. S-14.
18. On May 22, 2019, the Parent filed the current due process complaint.
19. There is no dispute that the Student made meaningful academic progress during the 2018-19 school year. NT *passim*.⁶
20. At the end of the 2018-19 school year, the District promoted the Student to 10th grade for the upcoming 2019-20 school year.

The Student's Social and Emotional Wellbeing

⁶ Throughout the hearing, both parties praised the Student's strong academic progress, including the Student's attainment of honor roll status, despite a number of medical absences.

21. The 2019-20 year will be the 12th grade year for most of the Student's same-aged peers. The District has placed the Student in 10th grade for the 2019-20 school year. The Parent wants me to change that placement to 11th grade.
22. The Parent testified credibly as to her impression that the Student feels "out of place" attending school with younger peers. NT 31.
23. The Parent testified credibly as to her impression that the Student will become emotionally distressed when same-aged peers graduate at the end of the 2019-20 school year. *See, e.g.* NT 31.
24. A Learning Support Teacher (the Teacher) served as the Student's case manager during the 2018-19 school year. In that capacity, the Teacher had many opportunities to observe the Student in school. NT 88-91.
25. The Teacher testified credibly that the Student has friends in school, socializes with a peer group of other students from grades 9 through 12, is polite, participates in extra-curricular activities, and displays high levels of confidence in peer interactions. *See, e.g.* NT 91, 109-110.

Discussion

A student's grade level may or may not be a factor in the student's receipt of special education. Some special education cases involving grade level concern the availability of special education placements as students move from one school building to another. *See, e.g. P.V. v. Sch. Dist. of Phila.*, 289 F.R.D. 227, 2013 U.S. Dist. LEXIS 21909 (E.D. Pa., Feb. 19, 2013). Other special education cases use a student's grade-to-grade progression as one of many factors used to determine whether the student received a free appropriate public education (FAPE). *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). In both types of cases, grade level may be a factor used to resolve other special education issues. In contrast, a student's grade level itself is not typically a special education issue.

The District correctly argues that the grade level dispute raised by the Parent is outside of my jurisdiction unless the Student's receipt of a FAPE is linked to the Student's grade level. I have authority to change the student's grade level only if I find that the change is necessary for the Student's receipt of a FAPE. *See Office of Special Education Programs (OSEP) Dear Colleague Letter, 11/09/2000.*⁷

In this case, there is no evidence linking the Student's grade level to the Student's receipt of a FAPE. There is no evidence that the special education services provided during the 2018-19 school year or proposed for the 2019-20 school year were or will be inappropriate. No evidence suggests that different special education options are available in 11th grade as compared to 10th grade.

The record does not establish a connection between the Student's grade level and the Student's receipt of a FAPE. That connection is a prerequisite to my jurisdiction over the grade level placement issue. Therefore, I do not have authority to order the District to place the Student in 11th grade for the upcoming 2019-20 school year.

The District argues that the grade placement issue and the anticipated graduation date issue are one and the same. Under the facts of this case, I agree. In theory, a child's expected graduation date may be evidence of whether a school anticipates that its special education services will close an academic gap

⁷ Between 2016 and the present, the United States Department of Education has revoked a substantial amount of policy guidance. To my knowledge, the referenced Dear Colleague letter still represents OSEP's position on this issue.

between the child and the child's same-age peers. Such circumstances are theoretical; I know of no such cases. Yet even if a child's anticipated graduation date could be evidence of an IEP's appropriateness, my authority to change the graduation date (as opposed to the child's special education services) is suspect in light of my general lack of authority to change a child's grade level placement.

In this case, the parties agree that the Student is progressing academically. The Parent argues that the proposed IEP does not set an expectation for the Student to catch up with same-age peers. This argument, however, is related to the Student's social and emotional wellbeing, not to the Student's academic growth. Since the Student's academic progress is not an issue, and the record draws no connection between the Student's graduation date and the Student's receipt of a FAPE, I do not have authority to change the Student's anticipated graduation date.⁸

Although I dismiss the Parent's complaint on jurisdictional grounds, I am compelled to address the Parent's arguments — both in deference to the Parent's *pro se* status and because I share some of the Parent's concerns about the Student's future emotional wellbeing.

Socially and emotionally, the Parent testified that the Student is self-aware, and is upset about being two years behind same-age peers. This testimony was credible. Equally-credible testimony from the Teacher shows that the Student's social and emotional state has not impacted upon the Student's education up to this point in time. I give more weight to the Teacher's testimony because the Teacher has had greater opportunity to observe the Student in school. The Student has shown confidence and formed a positive, multi-age peer group.

While the Student has been successful so far in the District, a majority of the Student's same-age peers will graduate and start their post-high school lives at the end of the 2019-20 school year. This could heighten the Student's awareness of the consequences of being held back twice at a young age. I encourage the District to keep a close watch on the Student's social and emotional wellbeing throughout the 2019-20 school year and into the 2020-21 school year. Nothing herein diminishes the District's obligation to propose evaluations if they become necessary and revise the Student's IEP depending on the results of those evaluations.

At the same time, the District's ability to reevaluate the Student if necessary and change the Student's IEP is contingent, in part, on the Parent's consent to proposed reevaluations. I encourage both parties to work cooperatively with each other so that the Student's needs can be assessed and addressed if circumstances warrant such action.

An order consistent with the above follows.

⁸ The Parent's demands would cause a discrepancy between the Student's grade placement and graduation date. The Parent asks me to move the Student into 11th grade. Under that proposal, the Student would still not graduate with same-age peers.

ORDER

Now, August 20, 2019, it is hereby **ORDERED** as follows:

The record of this case does not establish the link between the Student's grade placement and the Student's receipt of a FAPE that is a necessary precondition to my jurisdiction.

This matter is dismissed for lack of subject matter jurisdiction.

/s/ Brian Jason Ford
HEARING OFFICER