

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

DUE PROCESS HEARING

Name of Child: K.M.
ODR #2728/11-12-KE

Date of Birth:
[redacted]

Dates of Hearing:
February 21, 2012
March 2, 2012

CLOSED HEARING

Parties to the Hearing:

Parents

Representative:

Pro Se

West Chester Area School District
829 Paoli Pike
West Chester, PA 19382

David T. Painter, Esquire
Sweet, Stevens, Katz & Williams LLP
331 East Butler Avenue
New Britain, PA 18901

Date Record Closed:

March 22, 2012

Date of Decision:

April 11, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a teen aged child who resides in the West Chester Area School District [District] and currently attends a District high school. The Parents filed for this hearing, contesting the appropriateness of the District's proposed Individualized Education Program [IEP] for Student, and asking for an order directing it to develop a new IEP that addresses all Student's unique needs.

The District maintains that its proposed IEP is appropriate and should be implemented.

For the reasons presented below, I find for the District.

Issue

Was the District's proposed IEP of December 20, 2011 appropriate for Student?

Findings of Fact

1. Student is a resident of the District and attends one of its high schools. Student is eligible for special education on the basis of an Other Health Impairment [OHI]. [S-12, S-14, S-17]
2. Student began receiving special education services in kindergarten following [redacted] for which Student required surgery. [NT 35, 73]
3. Student has difficulty regulating behavior and emotions, and with executive functioning, working memory, and visual-spatial skills. Student requires additional time to process information and respond to questions or directions, and needs assistance with organizational skills, study skills, and tracking assignments. [NT 186, 252-253, 201-202, 205-206, 210-211, 276, 294]
4. Student was evaluated by a neuropsychologist at a local hospital for children in the spring of 2009. Assessments were administered to test Student's cognitive ability [WISC-IV], academic achievement [WIAT II], short term visual and verbal memory [WRAML 2], organizational skills [Wisconsin Card Sort Test], and visual-motor functioning [Wide Range Assessment of Visual-Motor Abilities and VMI]. Emotional functioning was also assessed using parent and teacher questionnaires [BASC-2]. [S-3]
5. The neuropsychologist reported that Student's evaluation revealed high average scores on the WISC-IV, grade- and age-appropriate scores on the WIAT, and high average functioning in the areas of working memory,

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

receptive vocabulary, spelling, and executive function. Weaknesses were noted with Student's processing speed, short term visual and verbal memory, language formulation, and visual-spatial skills. [S-3]

6. The District issued a Reevaluation Report [RR] in the fall of 2009 which incorporated information from the spring 2009 neuropsychological report and earlier evaluations, information from the Parents, teachers, and related service providers, and a classroom observation. New social and emotional functioning information was obtained using the BASC-2 with checklists completed by Student and one of Student's teachers. The RR concluded that Student continued to be eligible for special education. [S-5]
7. Recommendations in this RR addressed Student's weaknesses, including speech/language therapy, consultative occupational therapy, school- and family-based counseling, and special education on the basis of OHI to include reinforcement of skills and assistance. [S-3]
8. Since approximately December 2009, Student has been provided with wraparound services at home, including a mobile therapist [MT], a behavior specialist consultant [BSC], and a social worker. The BSC works with Student on noncompliant behavior, managing anxiety, social skills, and personal hygiene². [NT 38-41, 52-55, 57-59, 63-64, 68-70, 150-151]
9. Student's scores on the Pennsylvania System of School Assessment [PSSA] in the spring of 2010 were in the Proficient range in Mathematics, Science, and Writing, and in the Advanced range in Reading. [S-7]
10. The Parents obtained another neuropsychological evaluation at the same hospital in late 2010 which reflected lower scores on, and variability across, some of the WISC-IV Indices when compared to the fall 2009 evaluation. The neuropsychologist attributed these differences to Student's fatigue at the time of the testing rather than a decline in cognitive functioning. Student's scores on the WIAT-II were in the average to high average range. This neuropsychologist's recommendations were similar to those provided in 2009, including continued special education services [21% of the school day] and speech/language therapy to address language formulation and self-advocacy skills. [S-20]
11. Student began taking psychotropic medication in the spring of 2011 to help regulate Student's mood and behavior. [NT 64, 239; P-4 p. 6; S-8 p. 7, S-10 p. 6]
12. In the spring of the 2010-2011 school year and again in the fall of the 2011-2012 school year, the District arranged with the local Intermediate Unit [IU] to provide training for personnel working with Student about [Student's disability], characteristics that Student might exhibit, and strategies that might

² The BSC and the MT are funded as behavioral health services under the mental health funding stream.

prove useful in working with Student at school. The IU consultant who provided these trainings is affiliated with an organization [Organization] that has developed a specific program for working with children with this disability. [NT 159-60, 163-65]

13. Together with Student's BSC, the Parents developed seven proposed goals for Student's IEP in the fall of 2011. Those goals related to recording and completing assignments, complying with directives, remaining on task, using study skills, and self-initiating use of Student's Crisis Plan. [NT 52-53, 84-85, 154; P-5]
14. Student's IEP team met twice in November 2011 to develop a new IEP for Student. Representatives from the Organization participated in the meetings and gave the team members valuable information about Student. Student also attended and participated. The resultant IEP contained goals addressing self-management strategies, study and organizational skills, speech/language, and social skills, all of which were identified needs. Transition services related to Student's post-school interests were also included. Program modifications and specially designed instruction [SDI] included a Protocol for the Crisis Plan to address times when Student felt upset, anxious, or overwhelmed. Support for school personnel included yearly [specific] training by the Organization. The Parents did not approve the Notice of Recommended Educational Placement [NOREP] that followed these meetings and requested mediation. [NT 88-93, 200-202, 212-213, 216-217, 219, 270-271, 277, 290-291, 318-320, 322-325; S-8, S-9]
15. According to the Crisis Plan, when Student feels overwhelmed and unable to manage anxiety, Student reports to the resource room and a member of the team identified in the Plan is contacted to meet with Student. Student's case manager tracks how often Student uses the Crisis Plan. In comparing Student's use of the Plan during the 2011-2012 school year [9 times as of March 2, 2012] to the 2010-11 school year [30 times], Student used the Plan on many fewer occasions. Student currently requires less time to become calm enough to return to class than in the prior school year. Student has also started to initiate problem-solving skills in stressful situations. [NT 195-200, 202-03, 303-304]
16. The parties held a mediation session on December 20, 2011 that did not result in an agreement on Student's IEP. [NT 90-93; S-9, S-11]
17. Student's IEP as developed in November 2011 was revised on December 20, 2011 following the mediation session. An additional need was noted for self-advocacy. The goal for self-managing anxiety was clarified to reflect that Student would compare Student's rating of the effectiveness of strategies to those of an adult observer; the goal for recording and managing assignments and organizing materials was broken down into three separate goals; and the goal for applying higher-level language skills was slightly revised. The SDI

relating to organizational, self-advocacy, and study skills added frequent review of strategies taught. The Parents did not approve the NOREP that followed this revision. [NT 93-95, 214; P-4; S-10]

18. The Parents do not believe that the District's proposed IEP adequately addresses Student's needs for transition services including independent living skills.³ [NT 74-77]
19. The Parents believe that the District's proposed IEP of December 20, 2011 would be appropriate for Student if it included their seven proposed goals. [NT 91-93; P-5]
20. Student requires prompting at home to start and complete tasks such as homework. Student and the Parents often experience conflict in their verbal exchanges with each other, and the Parents are careful to try to avoid upsetting Student. [NT 26-30, 32, 35-36, 43, 56]
21. Student spends approximately one half to one hour on homework each day, and the Parents check to be sure that Student has completed all assignments. [NT 30-32]
22. The Parents regularly check Student's grades online and communicate with Student's teachers when necessary. [NT 48-50]
23. Student socializes with peers approximately once each week, including attending events at school. [NT 32-33]
24. Student has a study skills class [small group] with the special education teacher for one period each day. Student works on organizational skills, academic skills [mathematics] as needed, and recording assignments and sending them to the special education teacher and Parents each day. Student also seeks assistance from the special education teacher as needed throughout the day. [NT 48, 287-290, 299-301, 310-312, 315, 329-330]
25. Student works with a speech/language therapist twice each week, individually and in small groups, to work on social cognition skills and relationship perspectives, verbal reasoning, and processing skills, as well as pragmatic language skills. [NT 246-251, 254-255, 2602-61, 263, 280]
26. The school psychologist meets weekly with Student to work on managing anxiety. Student also visits the school psychologist on Student's own

³ The Parents referred to P-3, entitled "Special Education IEP Checklist," a "tip card" for students with Student's disability with a copyright date of 1998. As noted at the hearing, however, while this checklist is a helpful aid to developing an IEP for a student with this disability, it does not represent what the law requires. [NT 224-225] It also merits mention that the checklist merely lists possible needs to be addressed in an individual student's IEP depending on the individual's weaknesses, rather than specifying areas that must or should be incorporated for any child with this disability.

- initiative so that the two meet a minimum of twice each week. [NT 178-180, 203]
27. Student developed and uses a checklist to identify triggers for anxiety as well as strategies to use to manage that anxiety. [NT 209-210]
 28. Student is taking college preparatory classes during the current [2011-2012] school year. As of the end of the first semester [January 2012], Student had a 3.13 grade point average. Student has made progress toward, or mastered, Student's IEP goals over the 2010-2011 and 2011-2012 school years. [NT 228-229, 265-269, 279-280, 298, 308-310; S-16]
 29. Student participates in extra-curricular activities of interest to Student. [N.T. 200-201, 290-292]
 30. Student has a post-secondary goal of attending a four-year college. [NT 77, 204]
 31. Student's case manager for the wraparound services has assisted Student in applying for part-time employment, although as of the date of the due process hearing, Student did not yet have a job. [NT 33-34, 58-59]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in " equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer*. Upon very careful consideration and examination of the testimony and documents this hearing officer has determined that the District's evidence was more persuasive and thus weighted the scale in the District's favor such that a conclusion under *Schaffer* was ultimately not necessary.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing

officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

In this matter the witnesses testified candidly. Student’s Father testified in an honest, forthright manner about Student’s behavior in the home; however, he did not have testimony to offer about how Student behaved in school. Many of the concerns in the home that he discussed were “typical” of teenagers, whether or not they have a disability. Student’s Mother worked more with the behavioral health service providers in the home than did the Father. Therefore, his testimony could be given slight weight as to the issue presented.

Student’s Mother also testified credibly, but appeared to be focused on the memory and image of Student at the age of five when Student’s disability manifested itself rather than on how Student presents today. She also appeared unable to accept the fact that Student behaves very differently at school than at home. Her clear commitment to ensuring that Student’s needs for the future are addressed is commendable, but her expectations of the District’s obligations to provide an appropriate program through a verbatim adoption of the proposed goals limited the usefulness of her testimony.

Student’s wraparound behavioral services Case Manager did participate in at least one of Student’s IEP meetings, but only contributed information about medication management and her knowledge was limited to Student in the home. She did not comment on or contribute to development of goals in the IEP. Her testimony was given slight weight.

The Parent witness who was a volunteer with a network serving the population with Student’s disability was very knowledgeable and provided good background information about Student’s disability; however, she has never met Student and was therefore unable to comment on Student’s specific abilities, characteristics, and needs.

The BSC who helped develop the Parents’ proposed goals [P-5] has undergraduate and master’s degrees in psychology and is in the process of becoming certified as a Board Certified Behavior Analyst. [NT 156-57] However, she has no experience or background in special education or in working in a public school. [NT 155] While she provided some helpful background information on Student, her testimony on the issue presented was given little weight since her experience was limited to the home perspective and she is not qualified to develop or suggest IEP goals.

The IU consultant who provided the training to the District personnel has a bachelor’s degree in psychology and a master’s degree in special education. [NT 167-168] She has been trained in Student’s disability and the model used by the Organization [NT 167-168], and similarly testified credibly with some informative background on Student’s disability. However, her testimony had little effect on the Parents’ burden of proof in this matter and was therefore accorded minimal weight as to the issue under consideration, although her testimony provided a positive highlight regarding the District’s efforts to provide FAPE to Student.

The District school psychologist who provided counseling to Student has 17 years' experience as a school psychologist, a doctoral degree in school psychology, and is a certified school psychologist and a certified cognitive behavior therapist. [NT 176-177] She testified quite credibly, demonstrating a clear understanding of Student's disability and what level of support is appropriate for Student. She also testified convincingly to Student's functioning in school, and her belief that the IEP developed and proposed in December 2011 is appropriate for Student was persuasive.

The District speech/language therapist has 35 years' experience in educational and clinical settings, has bachelor's and master's degrees in speech and language, and is a licensed speech/language pathologist. [NT 243-245] She gave similar and extremely credible testimony on Student's functioning at school and the appropriateness of the December 2011 IEP.

Finally, Student's special education teacher and case manager, who has five years' experience, is certified as a special education teacher, and has nearly completed a master's degree in special education [NT 2852-86] provided thorough and very convincing testimony about how each of the Parents' proposed goals was already incorporated into the December 2011 IEP.

This hearing officer found the testimony of each of these latter three witnesses to be very persuasive on the issue presented.

Legal Basis

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act. 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a "free appropriate public education" [FAPE]. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9).

It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received FAPE. 20 U.S.C. §1415(f)(3)(E).

An "appropriate" education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1).

Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational

standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

School districts provide FAPE by designing and implementing a program of individualized instruction set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefit”, a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011)

An eligible student is denied FAPE if the IEP 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 (3rd Cir. 1996); *Polk*.

The Third Circuit explains that while an "appropriate" education must "provide 'significant learning' and confer 'meaningful benefit,'" it "need not maximize the potential of a disabled student." *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a “basic floor of opportunity”. There is no requirement to provide the “optimal level of services.” *Mary Courtney T. v. School District of Philadelphia*; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania’s federal court in the Eastern District noted, “Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit at the time it was created.

The Parents’ main complaint at the due process hearing is that the District’s proposed December 2011 IEP did not include all of their suggested goals. [Finding of Fact (FF) 19] However, the record convincingly establishes that all of those goals are, in one way or another, included in that IEP for Student. [NT 315-318; P-4, P-5, S-10] Some of those goals are in the SDI, and some are included in other goals.⁴ Simply because the

⁴ The first two proposed goals appear on pp. 21, 29, and 30 in the proposed IEP [P-4, S-10]; the third proposed goal appears on p. 22; the fourth proposed goal appears on pp. 26-27; the fifth proposed goal appears on p. 28 [although the District is not taking the requested data because that is not an indicated need

District did not mechanically add the proposed goals as newly created, specific and discrete goals to the IEP, does not render the IEP inappropriate.

Review of the proposed December 2011 IEP reveals that it is responsive to Student's unique identified needs. [FF 3, 7, 14, 15, 17, 24, 25, 26, 27, 28, 29, 30] I conclude that the IEP, based upon information known at the time it was drafted, is reasonably calculated to provide meaningful educational benefit to Student, including Student's transitional goals and needs. This December 2011 IEP appropriately and adequately addresses Student's need for self-advocacy, managing anxiety, organizational skills, independent management of assignments, study skills, and self-initiation of the Crisis Plan, remaining on task and demonstrating understanding of directives. [P-5] It includes virtually all of the school-related recommendations made in the two neuropsychological evaluations. [N.T. 185-186; P-4; S-3 pp. 6-7, S-20 pp. 7-8, S-10] The District's yearly [specific] training of its personnel working with Student is also reflective of its efforts to appropriately address Student's unique needs. [FF 12, 14] The transition services in this IEP are consistent with Student's current interests after leaving the District. [FF 14, 17, 23, 29, 30] Finally, with respect to independent living, the Parents have not established by a preponderance of the evidence that Student demonstrates a need for special education or related services toward the goal of living independently, such as adaptive behavior functioning, upon Student's future transition to post-secondary life. [NT 206-207]

The Parents are clearly very involved and caring parents who want what is best for Student. As described above, however, the law does not require that school districts provide optimal educational services to students with disabilities. Additionally, it is very apparent that the Parents' perspectives and concerns have been given significant consideration by the IEP team, for example by the District's inclusion of the essence of each of the Parents' proposed goals in the December 2011 IEP and, on a few occasions, verbatim language from those suggestions. [P-4, P-5; S-10] Further, as was explained at the hearing, the Parents hopefully understand that they have the ability and opportunity to obtain all desired information about any and all data collected on Student's progress in the District. [NT 77, 274-275]⁵

for Student, NT 317]; the sixth proposed goal appears on pp. 27-28, 31; and the seventh goal appears on p. 31.

⁵ The Parents also referred to these concerns over receipt of data in their Closing. [Parents' Closing pp. 5, 7, 14-15]

Order

It is hereby ordered that:

1. The District's December 20, 2011 proposed IEP was and is appropriate for Student.
2. The District is not required to take any further action.

Any claims not specifically addressed by this decision and order are denied and dismissed.

April 11, 2012
Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official