

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 Final Decision and Order

OPEN HEARING

ODR File Number:

22912-19-20

Child's Name:

K.M.

Date of Birth:

[redacted]

Parents:

[redacted]

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Hearing Officer:

James Gerl, CHO

Date of Decision:

April 27, 2020

BACKGROUND

The school district filed a due process complaint alleging that the student's placement must be changed from a supplemental learning support classroom to a supplemental life support classroom. I find that the school district has not proven that the change in placement is necessary or appropriate under IDEA.

PROCEDURAL HISTORY

Two telephone status conferences were convened in this matter prior to the hearing. Two continuances of the hearing were granted, but multiple requests for continuances by both parties thereafter were denied because of the age of this case. The parents were pro se when the district filed the complaint but were later represented by an attorney. The parents' first attorney later withdrew, and the parents participated in the hearing pro se, but with an advocate. After the hearing was completed, another attorney filed an appearance on behalf of the parents and filed the parents' post-hearing brief/written closing in this case.

The parties compiled an efficient administrative record in this matter. The testimony of 10 witnesses was presented in a single hearing session. School district exhibits 1 through 15 were admitted into evidence. Parents' exhibits 1 through 6 and 8 through 11 were admitted into evidence. Parents' exhibit 7 was excluded as irrelevant.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. Due to an editing error, the last two paragraphs of the parents' brief were not submitted in a timely fashion. Counsel for the district did not object to the entire parents' brief being considered, and the entire briefs of both parties were considered in making this decision. All arguments submitted by the parties have been considered. To the extent that the arguments advanced

by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUE PRESENTED

Prior to the hearing, the parties identified the issue to be decided in this case is the following:

Whether the school district has proven that the student's placement must be changed from a supplemental learning support class to a supplemental life support class?

FINDINGS OF FACT

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact. ¹

1. The student's date of birth is [redacted]. (S-6).

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parents' exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT___").

2. The student was born prematurely and as a result experienced developmental delays. The student sat up at age 1 and a half, began walking at 2-1/2 years and started speaking at age 3. (S-6; P-11; NT 242).
3. The student was born with undeveloped lungs and was placed on a ventilator for approximately one year after birth. (S-6; NT 242).
4. At approximately five months old, the student had a [redacted]. (S-6; NT 242).
5. The [redacted] was removed in April 2019, and the student no longer uses the ventilator. The student has been diagnosed with asthma, chronic lung disease, and gastroesophageal reflux disease. The student has experienced developmental delays. (S-6; P-11).
6. Pursuant to a doctor's order because the student is in a fragile medical state, the student's grandmother, who is also an LPN employed by an outside agency, has accompanied the student as the student's nurse throughout the entire school day in the previous school districts and in this school district. (S-6; NT 240, 252-253).
7. The student's previous school districts found the student to be eligible for special education under the eligibility categories of intellectual disability, other health impairment and speech language impairment. The student repeated the [redacted] grade during the 2018-2019 school year pursuant to the request of the student's parents. (S-6).

8. The student was reevaluated by a previous school district on February 19, 2019. The evaluator found that the student's cognitive abilities were in the extreme low range and that the student's cognitive scores continued to be in the mild intellectual disability range. The evaluator found the student's adaptive behavior skills to be in the average to below average range as rated by the parents and to be in the below average to extremely low range as rated by the student's teachers. (S-1; NT 89-92).
9. The student transferred to this school district at the start of the 2019-2020 school year. (S-6; S-10).
10. The student currently attends a supplemental learning support class in the school district. The student's school day includes three 40-minute periods of one-on-one instruction. The student's IEP notes that the student displays no behaviors that interfere with the learning of the student or other students. The student receives the related services of occupational therapy 90 minutes per month, speech language therapy in the amount of 700 minutes per IEP term and assistive technology consultations. The student's grandmother/nurse accompanies the student throughout the school day. The student's IEP places the student in the regular education classroom approximately 30% of the school day. The student is included with and has contact with regular education peers during the student's two related arts classes, currently music and physical education, as well as for lunch and various special end of the day items, such as club day or an assembly. (S-6; S-7; NT 102-104, 140-145, 169-170, 240, 244-245, 252-253).

11. Although the progress is slow, the student is making progress in the student's supplemental learning support class in the school district. In the last school year, the student has made progress in the ability to access materials, to access programs on the Chromebook, and progress in writing skills. The student's reading comprehension has improved, although the student is still on a first-grade level. Since the beginning of the year, the student has gone from pointing at things to giving verbal responses. The student has made substantial progress utilizing the "Claro" app that reads text aloud from documents. The student's math skills have improved substantially since the student was permitted to use a calculator. The school district did not have a speech therapist available during the first quarter of the 2019-2020 school year; the student made very limited progress in speech therapy during the school year. The student has shown progress in occupational therapy with regard to consistency in handwriting and the student has made great improvements in ability to navigate the school. The student has demonstrated an increased independence with regard to performing tasks. (S-6; S-14; S-15; P-6; P-1; P-5; S-5; S-9; NT 40-52, 58, 106-109, 147-148, 150-156, 173-178, 244-245).
12. The student's grades on the report card for the first two marking periods of the 2019-2020 school year were as follows: D and C for Academic Skills/Social Studies; B and C for Language Arts; and F and C for Mathematics. The student also received A grades in Art, Physical Education and Technology Education. (P-5; NT 155-157, 102-105).
13. The student's parents informed school district staff that the parents were happy with the academic progress that the student was making in the supplemental learning support class in the school district. (S-6 at p. 3; NT 203).

14. The student's IEP team met on September 23, 2019. At the meeting, the school district staff recommended that the student's placement be changed to a supplemental life support classroom. A supplemental life support classroom did not then exist in the school district, and school district staff were not aware of what the program would look like and were unable to describe it. The parents disagreed with the proposed change in placement. The school district's director of student services told the mother at the meeting that they were "polar opposites" concerning the issue and that "somebody is going to have to make the decision for us." (S-7; NT 191-193, 199-203).
15. The school district prepared a Notice of Recommended Educational Placement/prior written notice stating that the student's placement would be changed to a supplemental life support class and provided it to the parents at the September 23, 2019 IEP team meeting. The parents returned the Notice of Recommended Educational Placement/prior written notice on September 26, 2019, noting that they did not approve of the change of placement and that they objected to the level of occupational therapy services. (S-8; NT 199-202).
16. The supplemental life skills support class proposed by the school district would be more restrictive than the student's current placement and provide less opportunity for the student to interact with nondisabled peers. (NT 95-96).
17. The student's commute to the current placement is about five minutes. If the student were to attend the placement recommended by the school district in a neighboring district, the student's commute would be approximately 20 to 25 minutes. (NT 132-133, 246).

18. An IEP team meeting was convened on October 2, 2019. The IEP proposed by the school staff included additional occupational therapy services but continued to place the student in a supplemental life support program. (P-1, NT 59-61, 189-192).
19. A substantially similar Notice of Recommended Educational Placement/prior written notice was provided to the parents at an IEP team meeting on October 24, 2019. The parents did not return the NOREP, but the district understood that the parents were rejecting the proposed placement from the discussion at the IEP team meetings. (S-11; S-12, P-1; NT 189-192).
20. The school district filed the instant due process complaint on or about October 25, 2019 (NT 9).
21. In approximately February 2020, the parents and school staff toured a supplemental life support class in another district. The parents had appeared at the supplemental life support class for a tour in December 2019, but the tour was cancelled after they arrived due to an apparent miscommunication. (NT 126-133, 187-189, 197-199).

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, I have made the following conclusions of law:

1. A school district must "... to the maximum extent appropriate (ensure that) children with disabilities ... are educated with children who are non-disabled and that special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2); Individuals with Disabilities Education Act (hereinafter sometimes referred to as "IDEA") § 612(a)(5)(A); 22 Pa. Code § 14.145.
2. Supplementary aids and services are defined as "... aids, services, and other supports that are provided in regular education classes, other education-related settings and in extracurricular and non-academic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with ..." the least restrictive environment requirements. 34 C.F.R. § 300.42.
3. In determining the least restrictive environment placement, consideration should be given to ensure that a child with a disability is not removed from education in the regular education classroom solely because of needed modifications in the education curriculum. 34 C.F.R. § 300.116(e); 22 Pa. Code § 14.145(3).
4. One relevant factor in determining the least restrictive environment placement is that the student's school should be as close as possible to the child's home. 34 C.F.R. § 300.116(b)(3). Unless the IEP requires some other arrangement, the child should be educated in the school that he or she would attend if nondisabled. 34 C.F.R. § 300.116(c).

5. The Third Circuit has stated that the least restrictive environment provision sets forth a “strong congressional preference” for integrating children with disabilities in regular classrooms. *Oberti v. Board of Education*, 995 F.2d 1204, 19 IDELR 908 (3d Cir. 1993). The court adopted a two-part test for determining whether a district is in compliance with IDEA’s mainstreaming requirement.
 - a. First, the court must determine whether education in a regular classroom with the use of supplementary aids and services can be achieved satisfactorily.
 - b. Second, if the court finds that placement outside a regular classroom is necessary for the child to benefit educationally, then the court must decide whether the school has “mainstreamed the child to the maximum extent appropriate,” that is, whether the school has made efforts to include the child in school programs with nondisabled children whenever possible.

In determining the first prong of the two-part test, the court set forth three factors to be determined:

- c. First, the court should look at the steps that a school has taken to try to include the child in a regular classroom.
- d. Second, the court should consider in determining whether a child with a disability can be included in the regular classroom, comparing the educational benefits the child will receive in a regular classroom with supplementary aids and services versus the benefits the child will receive in a segregated special education classroom.
- e. Third, the court should consider the possible negative effects of the child’s inclusion on the education of other children in a regular classroom. When considering negative effects, the court

must keep in mind the school's obligation to provide supplementary aids and services to accommodate the child's disabilities. *Oberti, supra*.

6. A school district violates IDEA's least restrictive environment mandate where it merely pays lip service to the requirement and where district staff could not identify supplementary aids and services considered to keep the child in the general education classroom. *Hanna L by George L and Susan L v. Downingtown Area School District*, 63 IDELR 254 (E.D. Penna 2014).
7. The least restrictive environment requirement is a substantive requirement of IDEA. *Oberti, supra* at n.18; See, *TM by AM and RM v. Cornwall Central School District*, 752 F.3d 145, 63 IDELR 31 (2d Cir. 2014).
8. Where a school district predetermines the result of an IEP or a student's placement prior to the IEP team meeting, it deprives the parents of a meaningful opportunity to participate in the process and thereby violates IDEA. See *Deal v. Hamilton County Bd of Educ*, 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004); *JD v. Kanawha County Bd of Educ*, 48 IDELR 159 (S.D. WV. 2007). The key is that school district staff must keep an open mind regarding placement at the team meeting and duly consider the parents' input. See *JD v. Kanawha County Bd of Educ*, 48 IDELR 159 (S.D. W. Va. 2007).
9. A learning support class provides services for students with a disability who require services primarily in the areas of reading, writing, mathematics, or speaking or listening skills related to academic performance. 22 Pa. Code § 14.131(a)(1)(v).

10. A life skills support class provides services for students with a disability who require services primarily in the areas of academic, functional or vocational skills necessary for independent living.
22 Pa. Code § 14.131(a)(1)(vi).
11. The school district has not proven that a change in the student's placement from a supplemental learning support class to a supplemental life support class is appropriate or required under IDEA.

DISCUSSION

Has the school district proven that the student's placement must be changed from supplemental learning support to supplemental life support?

The school district filed this complaint seeking to require a change in the student's placement from a supplemental learning support placement to a supplemental life support placement. The parents opposed the change.

In their post-hearing brief, the parents contend that the change of placement which the district wishes to make for the student is not the least restrictive environment and that the school district had preconceived the student's placement before considering the parents' input. I agree with the parents that the school district has not proven that the student's placement must be changed from supplemental learning support to supplemental life support.

Applying the *Oberti* analysis to the facts of this case, it is clear that the placement that the school district wants is not the least restrictive environment for this student. The evidence in the record shows that the student was making progress, albeit relatively slow progress, since the student enrolled in the district and began attending the supplemental learning support classroom. The student's parents were happy with the student's academic progress. Given the student's individual circumstances,

the progress was meaningful. It appears that, without the proposed change of placement, the student was already making reasonable, appropriate and meaningful progress in light of the student's individual circumstances.

Andrew F. by Joseph F. v. Douglass County School District RE-1, 580 U.S. _____, 137 S. Ct. 988, 69 IDELR 174 (2017).

In addition, it is not clear what supplementary aids and services the school district attempted to utilize in order to keep the student in the less restrictive supplemental learning support classroom before moving the student to the supplemental life support classroom. None of the school district witnesses testified concerning supplementary aids and services that were considered or employed in order to keep the student in the less restrictive setting. The second step of the first prong of the Oberti analysis is to consider the benefits of educating the student in the less restrictive setting with supplementary aids and services versus a more restrictive setting. Here, the student was making progress in the less restrictive setting. As has been noted, it is not clear what supplementary aids and services the school district attempted to use to keep the student there. So, it is not clear what the benefit would be to the student if the school district employed additional supplementary aids and services. In addition, the student was benefitting from additional exposure to the student's nondisabled peers.

The third factor of the first prong of the analysis requires a determination of possible negative effects of the student's inclusion on the education of other students in the classroom. In the instant case, there is no evidence that the student engaged in any disruptive behaviors or any other inappropriate behaviors while at school. The student's IEP mentioned no behavioral issues, and no testimony was provided regarding any disruptive behaviors by the student or that the student was otherwise negatively affecting other students. The student's participation in the learning support

class had no negative effects upon other students. Thus, a weighing of the three relevant factors necessitates a conclusion that, although the full range of supplementary aids and services have not yet been employed or attempted, the education of the student can be achieved satisfactorily in the supplemental learning support classroom.

Moreover, the student currently attends the student's neighborhood school, whereas the district's proposed placement would not be in the school that the student would attend if nondisabled. The least restrictive environment requirement of IDEA mandates that the student be educated in the less restrictive supplemental learning support classroom. The school district has not proven that the proposed change of placement is appropriate or permissible under IDEA.

The parents' brief raises the additional concern that the school district had a preconceived notion of the appropriate placement for the student before considering the parents' position. The school district's director of student services made a revealing statement to the student's mother that their positions were "polar opposites." The director of student services also told the mother that someone else was going to "have to make the decision for us." There was no serious discussion or consideration of the parents' input regarding placement at the meetings. Thus, it is evident that the representatives of the school district did not have an open mind with regard to the position of the parents concerning placement. Instead of considering the parents' input, school district staff just threw up their hands and prematurely filed a due process complaint. The parents' input was not given due consideration by district staff. It is concluded that the district wrongfully predetermined the student's placement.

Even more troubling is the fact that the school district presented a Notice of Recommended Educational Placement for the change of placement to the parents at the September 23 IEP team meeting. The Notice of

Recommended Educational Placement was clearly prepared in advance of the meeting, and it was given to the parents by the district without the district considering the parents' input on the question of placement. It is therefore clear that the school district predetermined the placement of the student before even meeting with the parents. The district staff did not have an open mind concerning the parents' objections to the proposed placement. The parents were, therefore, denied meaningful participation because of the predetermination of the placement issue by the school district.

All of which is not to say that the IEP team might not reconsider placement at a later date. If after having tried the less restrictive supplemental learning support placement with the use of additional appropriate supplemental aids and services, the student is no longer making meaningful progress, based upon the student's individual circumstances, it may be appropriate for the team to reconsider a supplemental life support placement for the student. Obviously, however, the student's parents are an important part of the team that would make any placement decision, and their input must be given due consideration by the team.

It is noted that the parents' post-hearing brief cites an unpublished Third Circuit decision. Unpublished decisions have no precedential value. The Third Circuit has warned courts and hearing officers not to rely upon unpublished court decisions. *DF by AC v. Collingswood Borough Board of Education*, 694 F.3d 488, 59 IDELR 211 (3d Cir. 2012). The unpublished decision cited by the parents was not considered in reaching this decision.

To the extent that the testimony of the student's grandmother/nurse may be inconsistent with the testimony of the school district staff, the testimony of the student's grandmother/nurse is more credible and persuasive than the testimony of the school district's staff because of the demeanor of the witnesses, as well as the fact that the school district's

director of student services was somewhat evasive concerning the statements indicating predetermination of the placement issue.

It is concluded that the school district has not proven that the student's placement must be changed from the supplemental learning support class to a supplemental life support class. The school district has not proven that the supplemental life support placement is required or appropriate under IDEA.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that all relief requested in the due process complaint is hereby denied. The complaint is dismissed.

IT IS SO ORDERED.

ENTERED: April 27, 2020

James Gerl

James Gerl, CHO
Hearing Officer