

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.

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: KL

Date of Birth: xx/xx/xx

Date(s) of Hearing: November 5, 2007, December 10, 2007, December 11, 2007, January 24, 2008, January 28, 2008, April 16, 2008*

CLOSED HEARING

ODR NO. 8128/07-08AS

Parents

Mr. and Mrs.

Parents' Representative:

Jeffrey Ruder, Esq.
710 Fifth Avenue, Suite 2600
Pittsburgh, PA 15219

School District:

Shaler Area School District
1800 Mt. Royal Blvd.
Glenshaw, PA 15116

District Representative:

Christina Lane, Esq.
Andrews & Price
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Date Record Closed: May 20, 2008

Date of Decision: June 28, 2008**

Hearing Officer: Margaret Drayden, Esq.

*Parties waived the 45-day time period.

**Decision was delayed due to a medical emergency.

Précis

Student is a teen age student in the Shaler Area School District (“District”). Student is identified as qualifying for special education due to needs in the areas of speech/language (“SL”), occupational therapy (“OT”), and developmental delays due to mental retardation (“MR”). After several years of receiving the majority of Student’s educational program in a learning support (“LS”) class, the District believes that Student needs the assistance of a blended program, including life skills. Parents disagree and believe that life skills is a more restricted educational environment.

Findings of Fact

1. Student is a resident of the District and has attended District classes since kindergarten with learning support, SL, OT and physical therapy (“PT”). (NT at 1095-96; SD-1, SD-2.)¹
2. In the 2005-06 school year (“SY”), Student received a blended program of learning support services as well as life skills, along with SL and OT. (NT at 1096-97; SD-1, SD-2.)
3. On 1/12/06 the IEP team determined additional information was needed to determine Student’s appropriate placement for the upcoming 2006-07 SY. (SD-1.)
4. On 2/21/05, Student was evaluated by Dr. [redacted] of the [redacted] Institute. Student obtain a FSIQ of 46 on the Wechsler Intelligence Scale for Children – Fourth Ed. (WISC-IV) and a Test Composite score of 58 on the Stanford Binet Intelligence Scale – Fifth Ed. (SB-V); these scores are indicative of Mild to Moderate Mental Retardation. Student was administered the Woodcock Johnson Tests of Achievement – Third Ed. (WJ-III) where Student obtained a Broad Reading score of 65 and a Broad Math score of 68; these scores are significantly below grade level. Student showed a relative strength with tasks reliant on rote memorization, suggesting Student can learn discrete functional skills with repetition. Parent completed the Vineland Adaptive Behavior Scale – the total score was 43, which was also consistent with a finding of Mental Retardation. The Asperger Syndrome Diagnostic Scale and Childhood Autism Rating Scale – parent as well as the Conners’ parent Rating Scale – Revised, Short Version did not indicate any concerns with Asperger’s or ADHD. (NT at 29-;SD-1.)
5. On 5/8/06 the District’s Reevaluation Report (RR) issued. The RR incorporated the information from Dr. and in addition the following tests/rating scales were

¹Parents’ exhibits are noted as “P-”; District exhibits are noted as “SD-”; Hearing Officer exhibits are referenced as “HO-”; Noted Transcript is referenced as “NT”; Findings of Fact are noted as “FF”.

administered: WISC-IV, WIAT-II, Test of Nonverbal Intelligence (TONI-3), Adaptive Behavior Assessment System – Teacher Form (ABAS-II), ABAS-II – parent Form, and the CADS – Teacher and Parent Versions. Student earned a FSIQ of 48 on the WISC-IV; the TONI-3 IW score of 83 is in the 13th percentile (“Significantly low scores are percentile ranks below 16 or quotients below 85.”); the WIAT-II – Student’s scores were all in the “extremely low” range with the single exception of Pseudoword Decoding, where Student’s score was in the Borderline range. The RR noted that “Reading Comprehension is a particular area of difficulty”; the ABAS-II Teacher form composite score was 72 (which indicates that Student’s current adaptive skills exceed approximately 3% of same age peers); the ABAS-II Parent form composite score was 82 (which indicates Student’s current adaptive skills exceed approximately 12% of same age peers). The CADS – Teacher Version – was assessed by two teachers, and each teacher’s total DSM-IV score was 63; Parent Version was assessed by Parent and the total DSM-IV score was 64. A T-score of 65 and above indicates the student exhibits behaviors to a greater frequency, magnitude, or intensity when compared to same age peers. The Oral and Written Language Scales (OWLS), Receptive One-Word Picture Vocabulary (ROWPVT) and the Expressive One-Word Picture Vocabulary Test (EOWPVT) revealed that Student has expressive and receptive language skills fell 2 standard deviations below the average range, indicating a moderate delay in Student’s language skills. The TerraNova CAT Survey (a group administered achievement test) was administered in May 2005, and Student obtained a Total Reading percentile of 1, Total Mathematics of 11thile, Total Language – 3thile, with a Total Battery – 3thile. The RR concluded that Student’s primary disability category was mental retardation and a secondary disability category was SL impairment, and the recommendation was for a special education program incorporating both life skills and learning support. (NT at 26-43, 77-134; SD-1, SD-3.)

6. The RR observations/present levels of academic performance by teachers and related service providers for the 2005-06 SY included information, inter alia, that Student performed below grade level in English, reading, math, science, and social studies; that while Student received average to above average grades in English, Student “demonstrate[d] significant difficulty passing tests. [Student’s] rates of acquisition and retention [were] significantly lower than peers” and Student received adaptations including reduced assignments, adapted tests, special seating, and working with a partner to keep up in class. Student’s reading fluency score averaged 90 wpm on a 3d grade level, spelling skills indicated Student was spelling on a 4th grade level. All services were in a small group setting. (SD-1.)
7. The school psychologist, opined that Student has adaptive skill deficits, requires a lower instructional level with functional academics, has “extremely low reasoning skills”, relies on rote memorization, and cannot make meaningful educational progress in a learning support classroom. (NT at 42, 51-53, 199.)
8. Although the RR states the testing and classroom observations were in May 2005, the school psychologist testified that “I collected data only May of 2006.” (NT at 48, 50; SD-1.)
9. The intermediate school has adapted texts but the high school learning support

- students are on grade level. (NT at 244.)
10. A learning support teacher, testified that she had Student daily for 9th grade Earth Science and that Student was “so willing to please” but that Student’s “skill level created frustration for Student when attempting a task. Student’s skills were lower than the other students and so as much as Student would try, Student would fall behind because of Student’s basic skills. [Student] exhibits frustration by – I mean, [Student] would cry sometimes, sometimes [Student] would go – need to go to the guidance office, see the school counselor, and a lot of times, [Student] would also say Student didn’t feel well, to go to the nurse.” (NT at 225-6, 249.)
 11. The learning support teacher would further modify/adapt the classroom work by eliminating various assignments, limiting the number of questions, eliminating open-ended questions “or any type of sentence...create a sentence, eliminated true/false questions, provided word banks and one-on-one instruction. (NT at 225-227.)
 12. Student was unable to demonstrate knowledge of the curriculum because it was so highly adapted. (NT at 246.)
 13. Student’s processing skills are slower than the other learning support students, and Student could not keep up either academically or socially. (NT at 246.)
 14. Student has difficulties with socialization - Student doesn’t understand that staring makes other students uncomfortable and Student is unable to maintain peer relationships. (NT at 248, 398.)
 15. Study guides for class tests and quizzes were sent home a full week before the exams. The study guides were duplicates of the test/quizzes being given. (NT at 250.)
 16. On the 9th grade Life Skills English final, Student received 60%; on the final Reading Test Student received 61%; on the English 9 final exam, Student received 123 points out of 135; on the 9th grade Life Skills Social Studies final exam, Student received 30/30; on the Pre-Algebra final – Adapted exam, Student received 26%; and, on the Life Skills Earth Science 9th grade final exam Student received a 92% (Student had the study guide with answers provided). (NT at 250, 253-54, 441-46; SD-10.)
 17. The learning support teacher sought advice from the life skills teacher regarding additional adaptations to help Student experience more success, but all recommendations had been implemented and there were no additional accommodations to be made. (NT at 400-01.)
 18. The learning support teacher recommended that Student receive all academic classes in the life skills classroom. (NT at 400.)
 19. Ms. [] was Student’s 8th grade Sunday reading program teacher and 9th grade reading teacher. (NT at 409.)
 20. The Sunday reading program (available through 8th grade in the District) is for lower level reading students who experience weaknesses in reading fluency, reading recognition and comprehension. It focuses on phonetics with continuous drill and practice, and requires small group work. It is an oral program – no worksheets are used, just reading and repeating. (NT at 411-12, 417-21.)
 21. The 9th grade reading program , The Rewards Program (directed at 6-12th grades), like the Sunday reading program, is also orally based with drill and practice

- without any supplementary writing. (NT at 425-428.)
22. Student did not achieve Student's 9th grade annual goal of "reading a given passage at the 3d to 5th grade level and answer 4 out of 5 comprehension questions correctly on 4 out of 5 trials." The reading teacher testified that the 4th quarter progress report which indicated "achieved" should have read "partially achieved". (NT at 431-35; P-2.)
 23. Student did not achieve Student's 9th grade annual goal of interaction with others. Although the reading teacher would encourage classmates to interact with Student, Student did not socialize with the other learning support students; Student did not initiate any conversations and when other students would attempt to converse, Student would just answer in a "yes/no" fashion. Student was withdrawn, would sit with shoulders slumped, head down. (NT at 435-440, 579-80; P-2.)
 24. The reading teacher recommended to the IEP team that Student continue with reading development in the 10th grade. The reading program in the 10th grade is offered only through the life skills program. (NT at 448-49, 594-95.)
 25. The reading teacher testified that Student reads 3d grade material fluently but has difficulties with reading comprehension. (NT at 455-56, 506-07, 586-588.)
 26. Student was in the lowest reading level in the 9th grade reading class. (NT at 560-61.)
 27. The reading teacher testified that it is her belief that the IEP team's recommendation that Student's academic classes be provided in life skills was appropriate. (NT at 568.)
 28. The 9th grade learning support English teacher, testified that the class is a lower level than the typical learning support English class, and that she adapted the modified 9th grade curriculum still further to meet Student's needs by adapting the tests, reading aloud to Student, spending 1-on-1 time with Student to assist Student in writing paragraphs, taking notes for Student, restating things in different terms for clarification. (NT at 608-610.)
 29. Student was successful with basic concepts in LS English, but had significantly more difficulty with abstract thinking. (NT at 612-13.)
 30. Student was at the bottom of the lowered 9th grade LS English class. (NT at 629-30.)
 31. After a year of instruction in the lower level learning support class, Student had not mastered writing a sentence or paragraph, despite modifications, accommodations, 1-on-1 support. It was the 9th grade learning support English teacher's opinion that Student needed life skills English. (NT at 634-43, 647.)
 32. Learning support English is inappropriate for Student because it focuses on writing which demands more than rote memory. Rote memory allows Student to state the elements of a paragraph [topic sentence, 3 details, conclusion] but that does not help in ascertaining whether a particular sentence is the topic sentence, if the paragraph structure is proper, etc. (NT at 645-46.)
 33. The learning support and life skills teacher, taught Student in 8th grade for life skills science, extended school year (ESY) life skills summer camp after 8th and 9th grades, and 9th grade for social studies and life skills (a community-based instruction program) for the full year and 2d semester for English. (NT at 651-54.)

34. The learning support and life skills teacher testified she was part of the IEP team which developed the 9th grade IEP and the majority of the team believed it was in Student's best interests to focus on life skills, however, Parents disagreed but permitted a social studies class in life skills. (NT at 658-59.)
35. Student's community-based instruction (CBI) skills were lower than the learning support and life skills teacher anticipated – Student is very dependent and needs safety/survival skills as well as basic communication skills. (NT at 659-71.)
36. The learning support and life skills teacher opined that Student needs a life skills curriculum because Student needs skills with a real life focus – Student needs to develop social communications skills, the ability to “survive independently” and understand how to make purchases, count money, etc. (NT at 682-84.)
37. Student made minimal/no progress on numerous annual goals. (NT at 710-21; SD-8.)
38. Student has difficulty with long-term retention even when provided intense drilling and adaptations. (NT at 727-31, 814-15; P-10.)
39. The learning support and life skills teacher opined that the level of adaptations required for Student to experience educational success is found in life skills support rather than in learning support – such things as social cues and manners, such as saying hello rather than staring at someone, safety concerns such as seeking needed help/assistance. (NT at 736-38.)
40. Grades differ from IEP goals in that grades include completing homework and classroom assignments, coming to class prepared, and classroom participation as well as test scores while IEP goals monitor progress on the goal and does not factor in those additional components. (NT at 739-41.)
41. CBI is limited to life skills students. (NT at 746.)
42. Student experienced difficulty in 9th grade ESY in math activities such as counting change and rounding to the next dollar. (NT at 747-48, 897-98.)
43. The IEP team met at least 3 times from April – August 2007 and revised the proposed IEP and one of the meetings included a mediator. (NT at 765-68; SD-21.)
44. The proposed IEP, dated 8/8/07, and the accompanying NOREP, provides for a “blended program”, with the type of service noted as Resource and the type of support listed as “Life Skills and Learning Support and Speech”, not a full-time life skills program. (NT at 772-73; SD-20; P-9, P-10.)
45. The proposed IEP provides for a placement of 20 hours of the educational week and the IEP team checked the box showing 21-60% for the LRE Category; the 9th grade IEP provided 22.05 hours in special education for and the LRE Category was 61+% in special education. Student's 8th grade IEP provided for 25.5 hours in special education, again with a 61+% in special education, as did Student's 7th grade IEP. (NT at 774-77; SD-5; P-10, P-19, P-25, P-28.)
46. The District's life skills curriculum provides for developing skills such as writing simple sentences, basic math and statistics, interaction with classmates, peers and co-workers, demonstrating money skills and time skills. (NT at 815-825, 859; SD-24.)
47. The proposed 8/8/07 IEP was based on Student's needs as evidenced by Student's present educational levels not on the District's life skills curriculum. (NT at 869-

- 70.)
48. The 10th grade life skills teacher, testified that due to Student's strength in rote memorization, Student can memorize tests and thus score well, yet still lack basic skills. (NT 876-78.)
 49. The IEP team raised the goal attainment level to 100% due to Parents' wishes. (NT at 894-95.)
 50. The 6/29/07 Goodwill Industries' Vocational Evaluation (VE) recommended, inter alia, that Student "engage in prevocational training activities ... [which] may take place as part of Student's current school situation"; that Student's curriculum be reviewed and revised to "stress areas related to motor skills, sensory skills, emotional functioning, adaptive behavior/daily-living skills, verbal-receptive language skills, discrimination recall, spatial relations, and auditory sequencing;" and that Student "secure job readiness training, professional job development and job coaching." (SD-4.)
 51. A sheltered workshop environment is considered a "prevocational activity" and is an appropriate option for Student. (NT at 980-81.)
 52. Student's average factor score on the McCarron-Dial battery of tests was 57.7, which falls within the special population standard average range of 40-70. (NT at 918-19, 926-34; SD-4.)
 53. Student attained an age equivalency of 10 years 5 months on the Peabody Picture Vocabulary Test. (NT at 920.)
 54. The Goodwill Industries vocational evaluations supervisor, testified that based on Student's test scores, Student's intellectual abilities indicate Student may be successful in understanding a skill but unable to transfer that skill to another task. (NT at 922; SD-4.)
 55. The VE reported that Student "may generally understand simple concepts and analogies and may superficially relate these to Student's environment. Although Student may appear to function above the concrete operational level of development, Student may not internalize concepts, and therefore have difficulty generalizing from one set of circumstances to another. Others may often be misled by the apparent verbal-spatial-cognitive skills of individuals within this range.... Student may be able to rationalize this inability to transfer skills, thereby giving the appearance of functioning at a higher cognitive level." (SD-4.)
 56. On 10/05/07, Parent's educational expert, issued a psychological evaluation (IEE) wherein they reviewed prior testing and records, conducted a clinical interview with Parents and Student, and administered standardized measures (WJ-III-COG and WJ-III-ACH) to evaluate Student's intellectual functioning as well as academic achievement. Subsequent to the written evaluation, the Parent's educational expert did an observation. (NT at 1089-91; SD-2.)
 57. The WJ-III-COG was administered and Student earned a General Intellectual Ability Score (GIA) of 40, which falls within the Intellectual Disability Range and equals or exceeds the performance of 0.1% of all other adolescents Student's age. The Parent's educational expert noted in the evaluation that this score is consistent with the May 2006 RR findings. (NT at 1135-37; SD-2.)
 58. The Parent's educational expert also found that Student's cognitive efficiency is significantly weaker than Student's verbal skills and thinking ability, suggesting

- that Student has difficulty completing tasks rapidly. (NT at 1137-41; SD-2.)
59. The Parent's educational expert opined that Student's GIA score was lowered somewhat due to Student's cognitive efficiency score, but that the GIA – which is a composite score – is the most accurate. (NT at 1243-45, 1251.)
 60. The Parent's educational expert administered the WJ-III-ACH and found Student's reading skills were significantly better and listening comprehension and academic knowledge were significantly worse than Student's other academic achievement skills. Also, reading comprehension difficulty may be due to a lack of reading fluency, thus an inability to allow Student's working memory to hold concepts long enough to understand the meaning of words grouped together. Student's reading skills fall within the Intellectually Deficient to Borderline Range. (NT at 1127-28, 1156-58; SD-2.)
 61. The Parent's educational expert opined that the WJ-III-ACH scores suggest that Student was benefiting from Student's educational instruction and made good gains. (NT at 1110-1112.)
 62. Student performed at a level commensurate with Student's cognitive ability in all areas of testing with the exception of listening comprehension and academic knowledge. (Id.)
 63. The Parent's educational expert recommended a blended program of regular education classes, life skills and learning support in the 10/5/07 evaluation; however, testified that after observing Student, they would modify it slightly and recommend Student receive only math in the life skills class and opined that Student's proposed IEP goals could be met in a general education environment and that life skills did not represent the LRE. (NT at 1166-67, 1175, 1250-51; SD-2.)
 64. Student can benefit from peers who perform at a higher academic level, which the Parent's educational expert referred to as “structured mediated social interaction”. (NT at 1171, 1173.)
 65. The IEE included a DSM-IV diagnosis: Axis I: 315.32 – Mixed Receptive-Expressive Language Disorder; Axis II: 318.0 Moderate Mental Retardation; Axis III: None; Axis IV: Educational problems (Poor academic achievement); Axis V: GAF = 50 (current).² (NT at 1104, 1159, 1248-49; SD-2.)

² The Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”), published by the American Psychiatric Association, uses a multi-axial approach. Axis I lists clinical (mental) disorders; Axis II – developmental disorders and personality disorders; Axis III – physical conditions; Axis IV – severity of psychosocial stressors; and Axis V – global assessment of functioning, which is the level of functioning at the present time and the highest level within the past year. Axis IV represented the clinician's estimation of the client's overall severity of life stress in the past year. There are six categories/scores associated with this Axis: 1. No stress; 2. Mild stress; 3. Moderate stress; 4. Severe stress; 5. Extreme stress; and 6. Catastrophic stress. That information was not noted on the report. Axis V (Global Assessment of Functioning) has scores ranging from 1 to 100, with 100 being optimal. A score in the 91-100 range shows no symptoms impairing functioning. The DSM-IV lists a score of 41-50 as Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). Scores of 51-60 as Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupations, or school functioning (e.g., no friends, unable to keep a job). Scores of 61-70 are considered as Some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but

66. The Parent's educational expert agreed with the findings of the Goodwill Industries Vocational Evaluation and that Student has adaptive functional/vocational needs. (NT at 1164.)
67. The Parent's educational expert opined that Student's educational profile indicates the educational program should include visual, auditory, and direct learning approaches as well as concrete multi-sensory approaches. (NT at 1144-46, 1188, 1239.)
68. IEP Review Information sheets and Weekly Progress Reports clearly show that although Student tries hard and teachers are working diligently to adapt the information for Student, Student is struggling with the level of academics. Therefore, teachers recommend Student receive Student's education in a life skills placement. (P-31, P-33, P-34, P-37, P-39, P-44.)
69. The 8/8/07 proposed IEP contains present levels in the area of post-secondary transition; present levels of academic achievement; present levels of functional performance; a list of strengths and needs related to Student's disabilities; effect on involvement and progress in general education curriculum; 4 SL annual goals, 1 CBI annual goal, 2 reading goals, 2 writing goals, 3 math goals, 2 OT goals, 3 social competency goals, 1 goal for identifying money and making change, 1 goal for telling time, 1 goal for learning to measure in inches, and 1 goal for learning how to graph numbers; program modifications and SDI; related services, support for school personnel; a notation that Student qualifies for ESY; and Student's educational placement showing the type of service: Resource, and the type of support: Life Skills and Learning Support and Speech. (P-10; SD-19.)

Witness Credibility

1. School Psychologist – Earned a B.A. in Psychology in 1999 and a M.S. in Education in 2000 from [redacted] University. She also earned a Certificate of Advanced Study in School Psychology in 2002, which is NASP approved and has worked within the District since June 2002. She was credible – she answered without hesitation and was professional in her demeanor she was calm and assured, spoke knowledgeably and without hesitation.
2. 8th and 9th grade learning support teacher – Earned her undergraduate degree in Special Education/Elementary Education at [redacted] College and will earn her Master's in Special Education this December from [redacted] University. She has 6 years teaching experience with the District and 1 year prior experience in [state redacted]. She presented herself professionally and answered without hesitation. Her answers were well reasoned and articulate and her concern for Student was obvious. She was credible.

generally functioning pretty well, has some meaningful interpersonal relationships.

Student received the same GAF score (50) from [redacted] in the 2/21/05 Watson Institute neuropsychological evaluation.

3. 8th and 9th grade learning support teacher – Attended [redacted] University for undergraduate studies and received her certificate in Special Education; attended U. of [redacted] where she was certified in Elementary Education. She has taught reading and English in a learning support environment for 13 years in the District. She presented herself in a very professional manner; she is an experienced teacher and well-acquainted with Student. She answered the District solicitor's questions quite readily and without hesitation but she appeared somewhat resentful of Parents' counsel's questions. On the whole, however, her testimony was credible.
4. 8th grade inclusion and 9th grade learning support English teacher – She graduated from [redacted] University in 2000 and is certified in elementary; special education; and language arts (midlevel – grades 7- 9). She has 5 years experience with 3-1/2 of those years in the District. She spoke easily and with confidence, and was knowledgeable. Her testimony was very credible.
5. Learning support teacher – Earned a Bachelor's degree in Psychology from [redacted] University as well as early childhood, elementary, and special education certifications; is certified in mid-level language arts and mid-level math (grades 7-9) and is currently working on a Master's degree in Special Education at the University of [redacted]. She has approximately 4 years' experience within the District. She was very professional, answered directly and without hesitation. She was very knowledgeable and showed no bias. Her testimony was highly credible.
6. High school life skills teacher – Earned a Bachelor's degree in Psychology from [redacted] University in 2003, recently earned her Master's in Elementary Education from [redacted] University, and is certified in early childhood, elementary and special education. She has 4 years' experience, all of which are with the District. She presented herself in a professional manner and answered directly and thoroughly and while she was unable to articulate a reason for the life skills math decision, her testimony was credible.
7. Goodwill Industries Vocational Evaluations Supervisor –holds a Bachelor's degree for secondary education and social science and history from [redacted] College and has completed graduate-level coursework in vocational assessment. Additionally, she has additional training in vocational assessment, including the McCarron-Dial System which was used in Student's evaluation. She has 6 years experience as a vocational evaluator and 1-1/2 years as a vocational evaluations supervisor. She presented herself as a competent, assured, and knowledgeable professional. Her answers were well reasoned and even-handed; she obviously had no bias toward or against the District or Student. Her explanations were clear and understandable and she testified persuasively. This witness was very credible.
8. The Parent's educational expert – Asst. Professor in the School of Psychology, [redacted] University – The Parent's educational expert has a BA in Psychology from [redacted] College, and both a Master's and a Doctorate of Education in Educational Psychology from [redacted] University. Additionally she holds an Educational Specialist Certificate in school psychology from [redacted] University and is a nationally certified school psychologist and a level two PA certified school psychologist. She was admitted as an expert in school

psychology. The Parent’s educational expert was exceptionally well qualified and credible; she was well spoken and her testimony was evenhanded’ she presented herself in an assured, professional and confident manner. She was highly credible.

Discussion and Conclusions of Law

Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined parameters. Thus, any concerns parents may have regarding education services which concern matters beyond those parameters are beyond the purview of this process and this Hearing Officer.

Witness Credibility

Within the context of the special education arena, however, “Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision wherein the hearing officer has included ‘findings of fact, discussion and conclusions of law. . . [and] the decision shall be based solely upon the substantial evidence presented at the hearing.’”³ Quite often, testimony – or documentary evidence – conflicts; this is to be expected for, had the parties been in full accord, there would have been no need for a hearing. Thus, as stated, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence of facts which concern a child’s special education experience.

Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses” and “give some reason for discounting”⁴ or crediting evidence. Further, Hearing Officers’ decisions are to “specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions”.⁵ The Third Circuit, in Shore Regional High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. Id.,”⁶ Carlisle Area School v. Scott P., 62 F.3d

³ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

⁴ Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

⁵ Id. at *34.

⁶ Citing S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)

520, 527-29 (3d Cir. 1995). Specifically, this means that a District Court must accept the state agency's credibility determinations 'unless the non-testimonial, extrinsic evidence in the record would *justify* a contrary conclusion.' Carlisle, 62 F.3d at 592 (emphasis added). In this context the word 'justify' demands essentially the same standard of review by a federal appellate court. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985)."⁷ This court further held that "the task of evaluating [witnesses'] conflicting opinions lay in the first instance with the ALJ in whose presence they testified."⁸

Similarly, credibility has been addressed in various jurisdictions. Looking to California, Stevens v. Parke Davis & Co., 9 Cal.3d 51, 67-68 (1973) held that a trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted....[and also] reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." Further, a fact finder may reject the testimony of even an expert witness, although not contradicted. Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 890 (1971) And California courts have also found that "one credible witness may constitute substantial evidence". Kearl v. Bd. Of Medical Quality Assurance, 189 Cal.App.3d 1040, 1052. (1986).

Burden of Proof

The burden of proof consists of both the burden of production and the burden of persuasion. Neither the IDEA nor the IDEIA⁹ addressed the subject of burden of proof and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden in an administrative hearing challenging an Individualized Education Program ("IEP") generally fell to the LEA. Recently, however, the United States Supreme Court addressed this issue in Schaffer v. Weast, 126 S. Ct. 528 (2005). In the concluding paragraph of the Opinion of the Court, Justice O'Connor held: "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."¹⁰ In Antoine M. v. Chester Upland School District, Civ. Action No 05-3384, (E.D.Pa. Mar. 14, 2006), the Court held that even where the challenge is not to the sufficiency or appropriateness of an IEP, but rather for the failure to find a child eligible for one, "the overarching logic of Schaffer – that, in the context of the IDEA, the party bringing the challenge bears the burden of proof...[and] [a] student's challenge to a district's determination that he or she is not eligible for an IEP should not be treated any differently than a challenge to the adequacy of an IEP." Thus, where a "case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs,

⁷ Shore Regional at 199.

⁸ *Id.* at 201.

⁹ The IDEIA is variously referred to in case law as the IDEIA or IDEA 2004. In either event, it is one and the same.

¹⁰ 126 S.Ct. at 537.

Schaffer controls.”¹¹

The burden of persuasion in an administrative proceeding lies with the party seeking relief.¹² This requires the Hearing Officer to make a determination of whether or not the evidence is “equipoise” rather than preponderant. Preponderance of the evidence is defined as evidence presented by one party that is of greater weight or more convincing than the evidence offered by the other party. In other words, where there is evidence which tips the scales, the party which presented that evidence prevails. However, where the Hearing Officer finds the evidence is equally balanced on an issue, the non-moving party prevails.

Interestingly, neither party claimed to be the party requesting the hearing – or stated conversely – each party claimed the other was the one requesting the hearing. To enable the hearing to proceed, the District agreed to put on their case in chief while the issue of burden was decided. After reviewing the parties’ briefs and supporting documents, I found that while Parents did not directly file a complaint, Parents had provided the District with two dated and signed requests for a hearing. The District – through its correspondence and that of its counsel - requested confirmation that Parents were, in fact, seeking a due process hearing. When no answer was forthcoming, the District forwarded the Parents’ request to the Office for Dispute Resolution and a hearing was scheduled. I found that the act of forwarding Parents’ request did not shift the mantle as the party seeking relief from Parent to the District.

After the hearing concluded, I carefully examined and analyzed all of the evidence and the testimony and I did not find “equipoise”. Thus, the burden of persuasion was not at issue in this case.

Issue

1. Is the 8/8/07 proposed IEP appropriate and does it provide Student FAPE in the least restrictive environment?

To gauge an IEP’s appropriateness, it must be viewed in light of the IDEA and the relevant Regulations. It must include the student’s present levels of academic achievement, whether and how the disability/disabilities might affect involvement in regular education; annual goals designed to meet the needs that result from the child’s disability; specially designed instruction and the related services and supplementary aids and services to be provided; the program modifications or supports for school personnel that will be provided; and it must identify the anticipated date for beginning the services as well as the frequency, duration, and location of services. For older students, IEPs must include measurable postsecondary goals and transition processes.¹³ Further, it must be

¹¹ *L.E. v Ramsey Bd. Of Educ.*, 435 F.3d 384, 391 (3d Cir. 2006).

¹² *Greenwood v. Wissahickon Sch. Dist.*, Civ. Action No. 04-3880 (E.D. Pa. Feb. 3, 2006) (“Hence, because there is no Pennsylvania law imposing the burden on the district, *Schaffer* applies and the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP”.)

¹³ 34 C.F.R. §300.320(1-4).

“reasonably calculated” to enable the student to achieve a meaningful educational benefit.¹⁴ While the IEP need not provide the optimum educational experience or benefit, it must provide for significant learning.¹⁵ The question of whether an IEP is reasonably calculated to provide a student with an educational benefit can only be determined at the time it is offered, not some later date.¹⁶

The 8/8/07 proposed IEP which was developed by the IEP team over a period of months conforms to the IDEA regulations and the goals therein are based on Student’s needs as determined in the District’s 5/8/06 RR.

The question then turns to where Student’s needs can most effectively be addressed. The crux of Parents’ concern is the District’s conclusion that the majority of Student’s academic needs can no longer be adequately provided in the learning support classroom. It is not disputed that Student requires much of Student’s educational day be provided in a classroom without typical peers - Student has received special education services in learning support and/or life skills since kindergarten. Parents are not arguing that a greater percentage of Student’s day be in a regular education setting – rather, Parents feel strongly that Student should continue in learning support rather than a life skills class where, they contend, Student would not be sufficiently challenged.¹⁷

The Third Circuit court held, in Ridgewood Bd. Of Education v. N.E., 172 F.3d 238, 250 (3d Cir. 1999) that “IDEA’s central goal is that disabled students receive an appropriate education, not merely an appropriate IEP.” The IEP team has urged for two years that the educational focus should address Student’s more practical needs, such as social interaction; practical mathematics, making purchases at a store and understanding how to count change; and telling time. These areas of instruction are not provided in learning support classes but are addressed in life skills classes. Further, testimony by Student’s teachers was persuasive that Student has achieved passing grades due to the extremely high level of modifications and accommodations, as well as the result of memorization due to study guides, which were copies of tests (which sometimes contained the answer sheet) being sent home at least a week prior to the test. However, Student is unable to generalize that knowledge, reflecting that little or no real learning or understanding of that information is accomplished.¹⁸ In Board of Educ. v. Rowley, 458 U.S. 176, 203, n. 25 (1982), the Supreme Court held that merely passing from grade to grade and achieving passing grades is not dispositive that a student has received a FAPE.¹⁹ That is true in this instance.

¹⁴ Board of Educ. v. Rowley, 458 U.S. 176, 207 (1983).

¹⁵ Ridgewood Bd. Of Educ. v. M.E., 172 F.3d 238, 247 (3d Cir. 1999).

¹⁶ Furhmann v. East Hanover Bd. Of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993); Daniel G. v. Delaware Valley Sch. Dist., 813 A.2d 36, 43 (Pa. Cmwlth. 2002).

¹⁷ FF No. 45. The proposed IEP provides for a greater percentage of Student’s day with typical peers than prior IEPs.

¹⁸ Particularly persuasive was the explanation that while Student’s rote memory allows Student to state the elements of a paragraph that it does not help in ascertaining whether or not a particular sentence is a topic sentence, if a paragraph is properly structured, etc. See FF No. 32.

¹⁹ See also, 34 C.F.R. §300.101(c)(1): “Each State must ensure that FAPE is available to any individual

The weight of the testimony and documentary evidence is that while Student did make some progress due to extraordinary efforts by Student’s teachers and by Parents, as well, there cannot be a finding of meaningful educational progress or that Student receives an appropriate education with the majority of Student’s educational program remaining in a learning support environment.²⁰

Parents’ position is that not only will Student not be provided the opportunity to live up to Student’s potential if Student is moved to a life skills classroom but that life skills support is inherently a more restrictive placement and should trigger a LRE analysis. However, Parents’ position is misplaced. A LRE analysis looks to see whether a student is educated among typical, non-identified peers to the maximum extent appropriate while using supplemental aides and services to assist in that endeavor, not whether a particular classroom of identified students is more restrictive than another classroom of identified students.

The pertinent IDEA implementing regulation defines LRE at 34 C.F.R. §300.114(a)(2):

Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled

(Emphasis added.)

The Appeals Panel addressed a similar factual situation where parents raised the issue of LRE in Special Education Opinion No. 1290:

“Thus, the law on LRE is strictly a determination that the student’s placement allows maximum appropriate education alongside nondisabled peers. The proposed life skills placement provides exactly the same amount of education with nondisabled peers. The hearing officer made a determination without basis in any law that life skills is inherently more restrictive despite the fact that placement in life skills is not directly related to the amount of time Student will spend with his nondisabled peers. We see nothing in the language of IDEA or the subsequent line of so called “inclusion cases” that draws a connection between LRE and the name of the service (life skills vs. learning support), the number of students present (fewer in life skills), nor even the nature of the specialized curriculum....Furthermore, we see nothing in the language of the law that places life skills or learning support on the continuum of restrictiveness. Again, the

child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”

²⁰ In Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986), the court “rejected the notion that the provision of any educational benefit satisfies IDEA holding that IDEA ‘clearly imposes a higher standard.’” Ridgewood, 172 F.3d at 247.

plain language of the law refers to a continuum from all instruction in a general education setting (consultation or itinerant) to no instruction in a general education setting (a self-contained full-time special education placement). Thus, the law is clear that LRE is a time dimension with an underlying assumption that full time education alongside nondisabled peers is the least restrictive.

The system of placements developed by Pennsylvania for service delivery includes both time and methodology/content dimensions. The time element is addressed by the continuum of amount of interaction with nondisabled peers (full time general education to full time special education in an environment with no nondisabled peers) and is the LRE component of the placement. The methodology/content dimension is not driven by LRE considerations, but rather by the student's instructional (curriculum and methodology) needs.

....

For the reasons described above, we determine that placement in life skills is not inherently more restrictive than learning support.” (Emphasis added.)

Assuming, *arguendo*, the issue had required a LRE/Oberti analysis, part of that analysis would require a heavy reliance on the testimony of educational experts. The Parent's educational expert explained that Student's cognitive efficiency is significantly weaker than Student's verbal skills and thinking ability, which suggests Student has difficulty completing tasks rapidly; certainly this is helpful in discerning that it could have a negative impact upon Student's learning. However, the testimony from Student's teachers was that Student was provided lengthy periods of time to accomplish a much smaller amount of work, in addition to all of the other accommodations and modifications, as well as study guides to prepare for upcoming tests. Further, the Parent's educational expert's IEE as well as her direct testimony was that Student would benefit from a blended program of regular education classes, life skills and learning support.²¹ Therefore, although The Parent's educational expert differs on the amount of time Student should receive instruction in life skills, her position is not diametrically different from that of the District and the IEP team.

Looking again to Special Education Opinion No. 1290, the Appeals Panel asked the question of which classroom – learning support or life skills – was appropriate for Student's needs:

“We must analyze the IEP to determine whether the goals and objectives are more appropriately executed in learning support or life skills. The hearing officer agrees with the testimony of the district's witnesses that life skills are decidedly more appropriate for Student than learning support. The fact that learning support can be manipulated to resemble life skills is immaterial. Obviously, any child can be taught in any environment if the environment is changed enough to resemble the appropriate environment. This case hinges solely on the appropriate services and where they should be provided. If we followed the hearing officer's logic to its ultimate conclusion we would arrive at a determination that life skills is never

²¹ FF No. 63.

an appropriate placement because learning support can be altered to provide life skills type of services.

Our analysis of the IEP lends considerable support to placement in life skills. As Student enters middle school, more and more of Student IEP is devoted to development of functional skills designed to enhance Student independence as an adult. Even academic instruction is functional. It is not designed to prepare Student for more complex academic tasks such as reading for pleasure or reading for scientific content, but rather reading to survive on a daily basis; that is functional reading. Likewise math goals are functional (money and time) rather than academic (pre-algebra, numerical systems). We note again that the parents do not dispute the content of the IEP. Thus they are in agreement with the needs....Twenty-three needs are identified. Of those, 14 are clearly functional skill needs. Another eight are clearly functional academic skill needs since they represent a basic level of proficiency necessary to perform everyday tasks. Thus, since (a) the parties have stipulated that the IEP is appropriate, (b) the proposed life skills services are not a more restrictive placement than learning support and (c) the needs identified in the agreed upon IEP are more functional than academic, it is our conclusion that the service needed by Student is life skills support.” (Emphasis in original.)

Using the foregoing, I found the proposed IEP is appropriate, that the life skills services are not more restrictive placement than learning support, and that the needs identified in the proposed IEP are more functional than academic and the service needed by Student is a blended program of life skills, learning support and regular education.

ORDER

For the reasons hereinabove discussed, it is hereby ordered:

1. That the 8/8/07 proposed IEP is appropriate and provides Student FAPE in the least restrictive environment.
2. The IEP team is directed to meet and update the IEP for the upcoming school year.

Margaret Drayden

Hearing Officer

June 28, 2008

