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**PENNSYLVANIA**  
**SPECIAL EDUCATION HEARING OFFICER**

Student  
ODR #8309/07-08 KE  
Date of Birth: xx/xx/xx

Dates of Hearing

January 11, 2008  
January 16, 2008  
January 17, 2008  
January 28, 2008  
January 29, 2008

OPEN HEARING

For the Student:  
Parents

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Date Record Closed: February 18, 2008  
Date of Decision: March 2, 2008  
Hearing Officer: Daniel J. Myers

## **Background**

Student contests the School District's proposed educational placement, arguing that his middle school's requirement that he give up special area subjects in order to receive learning support services in the resource room violates his right to special education in the least restrictive environment appropriate. For the reasons described below, I find for Student.

## **Issues**

- Whether or not Student is receiving special education in the least restrictive environment appropriate;
- Whether or not Student's needs require pull-out learning support services; and
- Whether or not the middle school's schedule of Student's pull-out learning support services illegally restricts Student's access to special subjects.

## **Findings of Fact**

1. This School District's middle schools begin with 5<sup>th</sup> grade. Each day, over a cycle of six days, the middle school offers instruction in eight, 45 minute periods, with core 5<sup>th</sup> grade academic subjects occurring during periods 1 through 5, between 8 a.m. and noon. Sixth period is reserved for lunch and an activity (what I call "decompression") period. It is during this activity period that some regular education students receive extra time for tests if needed. (N.T. 198, 276) Seventh and eighth periods are reserved for 5<sup>th</sup> grade special area subjects, such as art, music, physical education, health, Foreign Language in the Elementary School

- (FLES), and a rotation of applied technology, technology education and family and consumer sciences. (N.T. 198, 460-461, 466) <sup>1</sup>
2. Also during 7<sup>th</sup> and 8<sup>th</sup> periods, 5<sup>th</sup> grade special education students who need learning support services in a resource room environment are assigned to the resource room (N.T. 40, 42, 490, 502), and 5<sup>th</sup> grade regular education students who are not proficient in the Math and/or English areas of the Pennsylvania System of School Assessment (PSSA) are assigned to regular education Math and English Seminars that are designed to provide extra support in those subject areas. (N.T. 466, 494, 503-504)
  3. One result of the School District's middle school's scheduling system is that students attending 7<sup>th</sup> / 8<sup>th</sup> period resource room must miss the special subject area classes that are offered at that time. There is no study-hall or period of non-instruction during the middle school day. (N.T. 40, 42, 468-469, 490, 502) The School District would have to change its current scheduling model significantly to allow special education students to attend both the resource room and all special area classes that are available to regular education students. (N.T. 472-473)
  4. Student, whose date of birth is xx/xx/xx, is a bright, xx-year-old, fifth grade middle school student with Attention Deficit Disorder and difficulties in executive functioning, attention, and written expression. He is an enthusiastic learner who needs adult guidance throughout the day to help with regulation of his emotions and behaviors. He has an aide assigned to redirect him in class, and he receives

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<sup>1</sup> References to "SD," "P," and "HO" are to the School District, Parent, and hearing officer exhibits, respectively. References to "N.T." are to the transcripts of the hearing sessions in this matter.

- behavioral health services outside school, including weekly cognitive behavior therapy. (SD2, p.5; P7; N.T. 33-37, 106, 200, 296)
5. In 4<sup>th</sup> grade (2006-2007), Student attended regular education classes for all subject areas. He also went to the resource room at various times each day: to finish work that was not completed; to receive additional reading support or instruction; and for behavior regulation when necessary. (N.T. 38-39, 109, 293)
  6. In Spring 2007, when Student's IEP team began developing his 5<sup>th</sup> grade, middle school IEP, he was reading one grade level below his chronological grade level, he had difficulty writing anything other than a few sentences, and he needed a regular, consistent daily schedule to address his need for predictable routine. (S5; N.T. 45, 52-53, 296, 298, 300; P4 p.26) The IEP team recommended continuing Student's daily time in a resource room. (N.T. 43)
  7. Consistent with the middle school's scheduling practice, Student's parent was asked to choose the three special area classes that Student would miss in order to receive his daily time in the resource room. (N.T. 40, 42-43, 45, 52-53; P4, p.26; P5, p.2; P6, pp.4-5)
  8. Student's parent complained to the Pennsylvania Department of Education (PDE) Division of Compliance regarding the middle school's scheduling requirement. (SD13; SD17; N.T. 113) PDE found the School District's policy to be in compliance with least restrictive environment (LRE) requirements because "regular education students are also asked to choose among the specials classes offered in order to attend various programs addressing a variety of individual needs." (P7, p.4; N.T. 57-59)

9. Over the summer, Student's IEP team worked assiduously to reduce his Resource Room time and allow more participation in special subject classes. The IEP team considered the use of Student's 6<sup>th</sup> period activity time for his occupational therapy (OT) and counseling services, but felt that Student needed to use that time for his preferred decompression activities. (N.T. 302-303) While the IEP team considered scheduling Student to attend all regular education classes, and sending him to the Resource Room only when he needs specific additional support, the IEP team rejected this arrangement because it requires substantial flexibility from Student and offers Student less predictability and routine. (N.T. 323)
10. Eventually, the IEP team reduced Student's scheduled time in the Resource Room from six to two periods in a six-day cycle. (P10, pp.26,28; S14;S18; N.T. 22-24, 301, 309) The School District also designed a special education/ regular education co-teaching arrangement in English and Reading (N.T. 66-67, 305; SD18; P12) and Student's mother agreed to reduce Student's total learning support services to allow attendance in regular education FLES and health classes. (N.T. 65, 117) Although Student is scheduled to receive some art and some music this year, his parent still had to agree that Student would miss some art and some music instruction in order to receive services in the Resource Room. (N.T. 118)
11. Currently, Student attends general education classes in Science, Social Studies, Math, English and Reading. (S28; N.T. 325-326) While his first semester Reading class was a below-level regular education class, Student has moved up for his second semester to an on-level Reading class that is co-taught by a regular education teacher and a special education teacher. (N.T. 100, 197, 209-213, 319)

- Student's regular education, on-level 5<sup>th</sup> grade English class also is co-taught. (N.T. 197, 205, 758, 778-779) Student has a behavior management plan and a personal care assistant (PCA) in all classes. (N.T. 324; SD31) Student goes to the resource room during 7<sup>th</sup>/8<sup>th</sup> period on two out of six cycle days. Student does not attend special subject classes on the two cycle days for which he is assigned to the resource room. (N.T. 70, 75, 213-214)
12. Student's learning support teacher (who also co-teaches his English and Reading classes) has 15 years experience, a masters degree and is highly qualified in elementary education. (N.T. 195-196) Student attends the highly-structured resource room with 8 other students, where he receives additional practice opportunities on the skills that are taught in his regular education subjects, including reinforcement of reading skills, guidance and support in developing written work, and preparation of flash cards for science facts and vocabulary. (N.T. 203-208, 211, 214-217; SD34; SD35)
13. There was no discussion among the IEP team of any alternative arrangement, including embedding additional writing practice in the social studies or science classes, or during 6<sup>th</sup> period activity time. (N.T. 52, 257-259) The School District has not attempted embedding additional practice in social studies and science classes. (N.T. 259)
14. One of the mainstreaming mechanisms tried by Student's IEP team has been to "push-in" Student's direct 30 minutes per week occupational therapy (OT) services. (P12, p.20) In other words, rather than having Student "pull-out" of a class to go to the OT, the OT enters Student's regular education class to provide

OT services. Student's OT testified that this push-in arrangement has not been as successful in achieving Student's OT goals as a pull-out system. (N.T. 422, 444)

This is because: 1) Student has resisted working with the OT in the regular education classroom and responds better to OT in one-on-one therapy sessions rather than in the regular classroom; 2) there were not many writing projects in the reading class with which the OT could work; and 3) the OT has pushed into the reading class only (as opposed to other classes that might involve more writing). (N.T. 414, 415-416, 425, 428) Lately, however, the OT has had greater success finding projects in the regular education class(es) with which to work with Student and two others in the classroom. (N.T. 446)

15. Student receives counseling as a related service in a manner that avoids conflict with his academic classes by going to the counselor's office instead of going to a core class or special area class, but he does this on a rotating basis so that he does not miss the same class or activity every time. (N.T. 302, 321-322)
16. Some school districts schedule resource room time so that it does not conflict with either core or special subjects. Sometimes they schedule a period during which some students go to resource room and others go to optional activities (that is, activities that are not graded nor a part of the curriculum) such as band. In other school districts, ninth period "study hall" is scheduled, during which neither core nor special subjects are scheduled, and during which all students can receive additional instruction of various types, including instruction in a resource room. Some middle schools have a float period or curriculum review time (CRT) that

- allows children to see teachers for extra help, go to learning support, and/or attend extracurricular activities. (N.T. 143-144, 184-185)
17. Student offered the expert testimony of Ms. L, a staff developer in differentiated instruction and co-teaching in a neighboring school district. She testified that “differentiated instruction” is a method for ensuring that all the students in a classroom “are being taught in the way that they can learn,” based on the premise that “if you have children who have a variety of needs, you need to be teaching them in a variety of ways.” (N.T. 724) In addition, co-teaching can be an effective mainstreaming methodology and a powerful tool for instruction when both teachers are engaged in instructional activities during the time they are with students in the classroom. (N.T. 743-745) Co-teaching and differentiated instruction enables one teacher to deliver either targeted remediation or enrichment to a smaller group of students while the other teacher teaches the larger group. (N.T. 744-750, 786)
18. Ms. L further testified that, in Student’s co-taught English class, a number of students appeared to be unengaged, passive participants in a thesaurus exercise that lacked sufficient books to go around. The special education co-teacher appeared to be more of a “glorified aide,” carrying out the “housekeeping” activities that needed to be done in the class. (N.T. 753-761) In Student’s co-taught reading class, the teachers seemed very new to co-teaching and appeared to have done little, if any, co-planning. (N.T. 764)
19. I find Ms. L’s testimony credible and useful in providing basic information regarding mainstreaming techniques. Ms. L’s testimony critiquing Student’s co-



taught English and Reading classes, however, was not credible and not useful because her conclusions were based solely upon impressions developed during a very limited observation, without systematic examination using any objective checklists or criteria.

20. Student's parent requested this due process hearing on November 15, 2007.

(Student's post-hearing memorandum, p.1) Student's parent would prefer that Student receive all the learning support services that he needs in regular education classes, with flexible access to a resource room when he needs it. (N.T. 71-72, 107) She objects to having to reduce Student's learning support time to allow him to take Health and FLES, and she objects to having to give up music class in order for Student to receive learning support services in the resource room for two days out of the six-day cycle. (P13;N.T. 74-75, 117) Student's parent also appears to contend that the middle school's entire scheduling system must be revised, complaining that Student's co-taught classes are not effective or efficient uses of teachers' time because the co-teaching model is new to the teachers employing it, and the learning support teacher is not as knowledgeable about the general curriculum as the general education teacher. (N.T. 254-255, 301)

21. The School District contends that Student must receive learning support services in the resource room in addition to the instruction that he receives in his co-taught English and Reading classes. "It's not that he could not do it with support in the co-taught classroom, it's that he needed additional instruction ... to do it independently." (N.T. 215-216) The School District further contends that students are not required to receive any particular amount of instruction in special

subjects; they are only required to have “some experience” in special areas, which requirement is met through the School District’s current middle school scheduling system. (N.T. 461-462)

22. At the due process hearing I admitted the following exhibits into the record.

- a. HO1-HO5 (N.T. 1165);
- b. P4-P7, P10-P13, P18, P19, P23-P25, P101, P201-P204, P301-P309, P312, P313, P315, P317-P332, P337-P350, P352, P353, P356. P345 was admitted over School District objection. (N.T. 1167-1169);
- c. SD2, SD5, SD6, SD13-SD15, SD17-SD19, SD21-SD35, SD38, SD107-SD110, SD113-SD120, SD123, SD124, SD126, SD128-SD134, SD136-SD38, SD143, SD144, SD203, SD207, SD208, SD210, SD214-SD216, SD218, SD221-SD223, SD227, SD301, SD303, SD305, SD306, SD308-SD312, SD314, SD315, SD317, SD322, SD324, SD327, SD330, SD331, SD335, SD336, SD340, SD344, SD345, SD347, SD349, SD350, SD353-SD356, SD360, SD361. (N.T. 1169-1170)

### **DISCUSSION**

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all Students who qualify for special education services. 20 U.S.C. § 1412 The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.)

Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

### **Burden of Proof**

The United States Supreme Court has held that, in an administrative hearing challenging a special education IEP, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence produced by the parties is completely balanced, or in equipoise, then the non-moving party prevails and the party with the burden of persuasion (i.e., the party seeking relief) must lose. Schaffer v. Weast, supra. If the evidence is not in equipoise, but rather one party's evidence is preponderant, or of greater weight or more convincing than the other party's evidence, then that party prevails whose evidence tips the scales.

In this case, Student seeks relief and therefore bears the burden of persuasion. Of course, as I just noted above, where any party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the evidence is not in equipoise, and the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence.

### **Least Restrictive Environment (LRE)**

School Districts are required, to the maximum extent appropriate, to educate children with disabilities with children who are nondisabled. 34 CFR §300.114(a) Carlisle Area School District v. Scott P., 62 F.3d 520, 535 (3d Cir.1995) A school district's obligation to make reasonable efforts to accommodate a disabled child in a

regular education classroom is substantial. Girty v. School District of Valley Grove, 163 F.Supp.2d 527 (W.D. Pa. 2001)

School districts must include disabled students in regular education classrooms even if the curriculum must be modified to permit such placement. 34 C.F.R. §300.116(e) The School District must tailor a program and placement to the Student's capabilities and limitations; it cannot simply attempt to fit the Student into a program, placement and curriculum that already exists within the School District. In Re C.D. and the Great Valley School District, Special Education Opinion No. 1858 (2008) An individualized educational program does not mean a separate class or room, but a set of coordinated services and interventions, delivered by persons capable of providing them, in the least restrictive environment appropriate. Id.; 34 CFR §300.114 Learning support services can be provided in any classroom by competent professionals; it does not require the aggregation of disabled students in a room. Great Valley School District, supra.

The two-part Oberti LRE test is to determine: 1) whether education in the regular classroom can be achieved satisfactorily with the use of supplementary aids and services; and 2) if not, what is the extent to which the child can be mainstreamed with regular education peers. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1995) It not necessary to move to the second part of Oberti's two-part test unless the first part demonstrates that placement outside the regular classroom is required. Id.

This analysis involves several factors, including: 1) whether the school district has made reasonable efforts to accommodate the student in a regular classroom; 2) the educational benefits available to the student in a regular education classroom with supplementary aids and services, as compared to the benefits of a segregated special

education classroom; and 3) the possible negative effect of the student's inclusion on the other children's educations.

If the School District has given no serious consideration to including the child in less restrictive classes with supplementary aids and services, and to modifying the curriculum to accommodate the child, then it has most likely violated the IDEA's mainstreaming, or LRE, directive. Even if the child receives less academic benefit in an inclusive setting, such setting may be warranted if the benefit of social modeling, language development and social skills development outweighs the potential academic benefit of a segregated setting. Girty v. School District of Valley Grove, 163 F.Supp.2d 257 (W.D. Pa. 2001)

In this case, I find that the School District has failed the Oberti test by not according serious consideration to including Student in regular education special subject classes with supplementary aids and services. I believe that serious LRE consideration requires that the School District eliminate from the IEP team's deliberations any artificial, arbitrary and super-imposed restrictions – such as a particular class-scheduling system.<sup>2</sup>

It is not difficult to schedule resource room time and core classes and special subjects for middle school students – other school districts do it. N.T. 183-185 In this case, School District personnel have worked hard at trying to maximize Student's general education participation within the limitations of the middle school's scheduling system. An example of such hard work is the creativity shown in Student's push-in OT services

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<sup>2</sup> This does not mean that the School District must change its entire middle school class scheduling system. It simply means that, in designing Student's IEP, his IEP team cannot be restricted by that system.

and the co-taught Reading and English classes. (N.T. 66-67, 305, 422, 444; SD18; P12)

I can only imagine how much more creativity, less restrictiveness, and greater responsiveness to Student's needs is possible if the IEP team is not hamstrung by the arbitrary limitations of the middle school's scheduling system. The fact that I must imagine, and cannot read in this record, evidence of creative mainstreaming in all areas of Student's needs, unconstrained by any artificial class-scheduling system, is proof that this School District has not satisfied its Oberti/ Girty "serious consideration" requirement. Artificially restricted consideration is not "serious consideration."

I acknowledge PDE's conclusion in summer 2007 that the School District was in compliance with its least restrictive environment (LRE) requirements. (P7, p.4; N.T. 57-59) PDE's conclusion was based, at least in part, upon the fact that some 5<sup>th</sup> grade regular education students are involuntarily assigned to PSSA Math and English Seminars during 7<sup>th</sup> and 8<sup>th</sup> periods. These regular education students find themselves, like Student, having to choose which special classes they will miss in order to attend various programs addressing their individual needs. (N.T. 466, 494, 503-504; P7) While this does, at first glance, suggest a parity between regular education students and Student (because both are forced to miss special subject classes), I find these not to be equivalent situations for two reasons.

First, the choices at issue for the regular education students are between regular education environments. For Student, however, the choice is not between a seminar with regular education peers or specials with regular education peers; rather, Student's choice is between specials with regular education peers and a more restrictive special education environment. Second, and probably more importantly, the regular education students'

“seminar vs. specials” choice does not infringe upon their civil rights, but the “resource room vs. specials” choice does. As ironic as it may sound, regular education students do not have a statutory right to LRE; Student, on the other hand, does. Thus, while both regular education students and Student are asked to miss specials in the middle school, ostensibly to better meet their educational needs, Student is also being asked to forgo his right to LRE. I therefore do not consider the situations of regular education seminar students and Student to be equivalent.

My ruling in this case does not mean that there is, in fact, a less restrictive environment into which Student must be placed. It simply means that the School District has not met its obligation to give serious consideration to including Student in LRE settings with appropriate supplementary aids and services.

There is one area in which serious consideration of inclusion opportunities already has been given, i.e., in OT. In that case, Student’s push-in services may not be as successful as a pull-out system. (N.T. 422, 444) This may be because Student has resisted working with the OT in the regular classroom and responds better to one-on-one therapy sessions, although recent observations suggest that the push-in model may be starting to have greater success. (N.T. 414, 415-416, 425, 428, 446) It is possible that, after further observation of this mainstreaming OT experience, Student’s IEP team will conclude that he needs a more restrictive environment for OT. Such conclusion, however, will then have been based upon serious, data-driven consideration of inclusion opportunities in one area of Student’s needs.

Given the IEP team’s willingness to try co-teaching even within the rigidity of the current scheduling system, I suspect that, when unencumbered by artificial class-

scheduling restrictions, Student's IEP team will be very creative in brainstorming additional inclusion opportunities in Student's other areas of need.<sup>3</sup> While such brainstorming does not guarantee that Student actually will benefit from any less restrictive program and placement than that which has already been offered by the School District, it does mean that the resulting proposed placement is more likely to satisfy the rigorous Oberti/ Girty "serious consideration" requirement than does the current proposed placement. It should also result in a more concrete, data-driven record of what truly is the least restrictive environment appropriate for Student.

### **Remedy**

Student clearly seeks relief in the form of a less restrictive educational environment. In his post-hearing brief, he also suggests, almost half-heartedly, that he is entitled to compensatory education somewhere in the neighborhood of between 1400 hours and 180 days. Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. M.C. v Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990), cert. denied, 488 U.S. 923 (1991) For many years the period of compensatory education has been calculated to be equal to the period of deprivation, less a reasonable rectification period. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) Since 2006, hearing officers can also focus on what it will take to bring the student to the point he

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<sup>3</sup> Inclusion experts are available for school districts in listing a full continuum of supports and services, for development of universal design for learning, for curriculum planning, and/or for professional development. See C.M. and the Central Bucks School District, Special Education Opinion No. 1430 (2003); G.A.B. and the Hempfield Area School District, Special Education Opinion No. 1467 (2004)



should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 2006)

It is not clear to me that compensatory education is an appropriate remedy for an LRE failure. In Re B.T. and Derry Township School District, Special Education Opinion No. 1781 (2006); In Re A.G. and Wissahickon School District, Special Education Opinion No. 1455 (2004) In this case, I believe that the appropriate remedy is to order, not compensatory education, but IEP team reconsideration of the proposed program and placement, giving serious consideration to including Student in less restrictive classes with supplementary aids and services, and to modifying the curriculum to accommodate Student's needs. Thus, the School District will be required to reconvene the IEP team to consider any additional supplementary aids and services that it might employ, in addition to the extant programs it already has, to increase Student's inclusion in the regular education classroom.

### **Conclusion**

The School District has not satisfied the Oberti/Girty test by failing to accord serious consideration to including Student in regular education special subject classes with supplementary aids and services. Serious LRE consideration requires that the School District eliminate from the IEP team's deliberations any artificial, arbitrary and super-imposed class-scheduling restrictions. I will order the School District to reconvene the IEP team for more appropriate LRE consideration.

**ORDER**

- The School District's proposed program and placement is inappropriate because it was not developed with the intention to accommodate Student in a regular education classroom with supplementary aids and services to the maximum extent appropriate;
- The School District shall reconvene the IEP team to develop an IEP with the intention to accommodate Student in a regular classroom with supplementary aids and services to the maximum extent appropriate. This IEP development shall include:
  - consideration of why particular mainstreaming opportunities are, or are not, appropriate for Student, without reference to any arbitrary, self-limiting conditions such as a class scheduling system;
  - systematic matching of Student's IEP goals to the general curriculum, including all special area subjects;
  - consideration of the development of universal design for learning, use of co-teachers, and differentiated and/or parallel instruction;
  - consideration of the professional development necessary to implement LRE requirements;
  - consideration of the educational benefits available to the student in a regular education classroom with supplementary aids and services, as compared to the benefits of a segregated special education classroom;
  - consideration of the possible negative effect of the student's inclusion on the other children's educations;

- consideration of the use of outside inclusion experts for assistance in listing a full continuum of various supports and services that might be considered for Student; and
- a mechanism for monitoring and fine-tuning Student's inclusion experiences in another IEP meeting before the end of the current semester.

*Daniel J. Myers*

Hearing Officer

Date: March 2, 2008

Re: ODR No. 8309/07-08 KE  
Student  
Tredyffrin-Easttown School District