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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

CK
ODR #8310/07-08 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:

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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 5th grade. Each day, over a cycle of six days, the middle school offers instruction in eight, 45 minute periods, with core 5th 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 5th 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) ¹
2. Also during 7th and 8th periods, 5th 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 5th 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 scheduling system is that students attending 7th / 8th 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 an xx year old, 5th grader who has been diagnosed with Asperger's Syndrome and attention deficit disorder (ADD) (N.T. 135-137) Student enjoys routines, thrives in predictable and structured environments, excels in concrete subjects, struggles with abstractions, relates well with adults, has few friends, and doesn't like large noisy settings, or unpredictable

¹ 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.

- activities such as field trips and classroom parties. (N.T. 136, 246) Student has academic needs in reading fluency, reading comprehension, written expression, and emotional/behavioral regulation. (N.T. 233, 236, 239, 330-331)
5. In elementary school last year, Student was fully included in regular education classes, except for language arts. He went to the resource room every day for language arts instruction and to complete activities that he did not complete in his general education classes. (N.T. 138, 329-333, 402-403)
 6. Throughout Spring and Summer 2007, Student's parent met with School District officials to prepare for Student's transition to middle school. Everyone agreed that Student would continue to need daily time in the resource room for extra instruction. (N.T. 144, 187, 340; SD120) 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. 140-143)
 7. In July 2007, Student's parent complained to the Pennsylvania Department of Education (PDE) Division of Compliance regarding the middle school's scheduling requirement. (SD109) 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." (SD113)
 8. In August 2007, the parties met to discuss Student's parent's concerns regarding Student's educational program and placement. Student's parent asked for full

- participation with typical peers in all special area classes, and for modifications of the middle school schedule similar to the schedules of other surrounding districts in which students can receive resource room support without giving up special area subjects. (N.T. 364) The parties agreed that Student would attend a special education/ regular education co-teaching arrangement in English and Reading. (S119; N.T. 254) They also agreed that Student's occupational therapy (OT) services would be "pushed-into" his regular education classes (as opposed to having Student pulled out of class for OT.) (S119) The parties also agreed to rotate the day and time of counseling services so that Student would not miss the same class each week. (S119) Despite these agreements, Student's parent rejected the August 2007 Notice of Recommended Educational Placement (NOREP) and proposed IEP because Student would still be required to miss some special area subjects in order to receive any services in the resource room. (SD108; SD120; SD123; SD124; SD126; N.T. 144-145, 159-161)
9. Additional IEP meetings were held on October 16, 2007, November 29, 2007 and January 3, 2008. (SD129; SD131; SD132; SD143; SD144) At the November 29 meeting, the parties agreed to reduce Student's resource room time from 6 to 4 periods/cycle, and that Student would attend art class. (N.T. 231-232, 237, 351, 355; SD131; SD136) At the January 3 meeting, it was decided that Student would switch from art to health for a period of time and then return to art. (N.T. 190-192)
10. In response to a parental request, the School District funded a November 10, 2007 independent reading evaluation of Student. (N.T. 373-375, 389-390; SD130) The

evaluation indicated that Student has good decoding skills but that he decodes slowly, not automatically, which decreases his fluency and comprehension. Finding Student's independent reading level to be at a 3rd-4th grade level, the evaluation recommended substantial practice ("read tons of books") in decoding/word recognition skills at his independent reading level, as well as reading to Student at a level 2-3 years above his "current" level (which appears to refer to his 3rd/4th grade independent level) to expose him to higher level vocabulary and concepts. (SD130, p.6)

11. Inexplicably, despite the intervening November 2007 reading evaluation, the present education levels in reading in Student's July 2007 and January 2008 IEPs are exactly the same. (SD 115; SD143) Further, the IEP goals are inconsistent with both the IEP present education levels and the results described in the reading evaluation. The evaluation finds Student's independent reading level to be at a 3rd-4th grade level. (SD130) The IEPs' present education levels indicate that Student is being taught at the 4th grade level. (SD 115; SD143) The IEP goals, however, refer to fluency levels on unrehearsed 5th grade level material. (SD115, p.14; SD143, p.15) These goals do not appear to be based upon Student's needs.
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. 195-197, 209, 231) 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, 210-211, 214-217, 239-240, 1059-1060; SD34; SD35) Although the resource room teacher also is available at any time of the day to support Student regarding social issues, she has been called for assistance only twice this year, both times during morning recess, and never into any academic classes. (N.T. 252) Student infrequently comes to the resource room to “regroup,” but other such places exist in the school building, for example the guidance office. (N.T. 240-241, 268-270)

13. 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) 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) 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 class, 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.

14. 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)
15. The only requirement in Student’s IEP that cannot be implemented in a regular education classroom is his removal to a resource room for a break when needed. (SD143; N.T. 244-245)
16. The School District 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)

17. On November 15, 2007, Student’s parent requested this due process hearing.

(Student’s post-hearing memorandum, p.1) 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-SD138, 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.²

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.

² 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.

An example of such hard work is the creativity shown in Student's push-in OT services 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 5th grade regular education students are involuntarily assigned to PSSA Math and English Seminars during 7th and 8th 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.

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.³ 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

³ 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)

placement. It should also result in a more concrete, data-driven record of what truly is the least restrictive environment appropriate for Student.

Reading Instruction

Student alleges that he has never had a comprehensive, systematic reading program designed by a group of researchers and presented in its entirety from beginning to end, covering all components of reading including fluency, vocabulary and comprehension. Instead, he complains, he is taught using an eclectic approach to reading which is only as good as the single professional “who is pulling things off the shelf and putting it together.” (N.T. 171, 256-257) Student contends that, because he has never received a systematic approach to reading, his November 2007 reading evaluation shows significant gaps in Student’s reading profile. (N.T. 166-168; SD130)

I agree that Student’s reading program appears to lack any systematic approach. Despite an intervening November 2007 reading evaluation, the present education levels in reading in Student’s July 2007 and January 2008 IEPs are exactly the same. (SD 115; SD143) Further, the July 2007 and January 2008 IEP goals are inconsistent with both the IEP present education levels and the November 2007 reading evaluation. The evaluation finds Student’s independent reading level to be at a 3rd-4th grade level. (SD130) The IEPs’ present education levels indicate that Student is being taught at the 4th grade level. (SD 115; SD143) The IEP goals, however, refer to fluency levels on unrehearsed 5th grade level material. (SD115, p.14; SD143, p.15) These inconsistencies indicate two lacks: 1) an understanding of Student’s reading needs; and 2) a systematic approach to meeting Student’s reading needs.

I will order Student's IEP team to update his IEP present education levels in reading with a systematic description of his reading needs in all components of reading. I will also order his IEP team to develop reading goals that systematically address Student's needs in all components of reading.

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 (3rd Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3rd 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 (3rd Cir. 1999) Since 2006, hearing officers can also focus on what it will take to bring the student to the point he 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 the first place. 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.

With regard to Student's reading goal, the level of achievement that Student would have attained had his goal been more systematic is not addressed in testimony or exhibits. My sense is that the appropriate remedy in this case is prospective and, lacking any evidentiary basis for determining the amount of compensatory education required to bring Student to the position he would have attained had the reading goal been more systematic, I will not award compensatory education. Instead, I will order the IEP team to develop more systematic reading goals in all components of reading that systematically address all of Student's reading needs.

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. The School District also has not appropriately addressed Student's reading needs. I will order the School District to reconvene the IEP team for more appropriate consideration of Student's reading needs as well as serious consideration of Student's inclusion in regular education special subject classes with supplementary aids and services.

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's proposed program and placement is inappropriate because it fails to appropriately describe Student's present education levels in reading and its proposed reading goal fails to address Student's reading needs systematically.
- The School District shall reconvene the IEP team to develop an IEP that systematically describes Student's needs in all components of reading, and that contains reading goals that systematically address all of Student's reading needs.
- The IEP team shall also 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. 8310/07-08 KE
Student
Tredyffrin-Easttown School District