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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

CD

ODR #8312/07-08 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:

Director of Special Education
Tredyffrin-Easttown School District
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For the School District:

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 her middle school's requirement that she give up special area subjects in order to receive learning support services in the resource room violates her right to special education in the least restrictive environment appropriate. Student also complains about the substantive appropriateness of her IEP. 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 (Math, Science, English, Social studies, and Reading) occurring during periods 1 through 5, between 8 a.m. and noon. (N.T. 456-457, 474)¹ Sixth period is reserved for lunch and an activity (what I call "decompression") period. (N.T. 460) 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

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.

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)

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 a xx year old 5th grade student with Attention Deficit Hyperactivity Disorder (ADHD), decreased sensory processing skills, hypotonia, and social behavior deficits that meet the criteria for an autism spectrum disorder. (SD216, p.2; N.T. 520) She is below grade level in reading and

has difficulty with writing, both mechanically and with the writing process. (SD216, pp. 4-5; SD218; P202, p.3; N.T. 552, 595)

5. In elementary school, Student was mainstreamed for all subjects. She received extra reading instruction, as well as additional assistance in writing, in the resource room. She also received speech/language therapy and occupational therapy (OT) in elementary school. (SD203; N.T. 521, 561-563)
6. Student began attending middle school in the fall of 2007, attending regular education classes in all core academic subject areas. Student attended a resource room for learning support services for one period each day. (SD210; SD221) The learning support services that Student receives in the resource room involve writing skills, reading decoding, reading fluency, encoding, organization skills and study skills. In addition, Student receives occupational therapy in the resource room. (N.T. 637, 649-650, 656)
7. During her resource room period, Student does not attend a special subject area class. (N.T. 524, 531, 533-534) Neither Student's parent nor School District officials recall ever asking Student's parent which special subject area class(es) Student would miss in order to receive learning support services in the resource room. (N.T. 726)
8. On October 3, 2007, a new IEP was developed for Student, assigning her to the resource room for four days out of the cycle, rather than six. This enabled Student to attend one special subject area class, i.e., Health. (N.T. 534-536; SD214, p.30; SD221) During that October 2007 IEP meeting, School District staff never discussed any alternatives to the resource room, such as co-teaching in the regular education classroom or differentiated instruction. (N.T. 537)

9. Student attends a below-grade-level regular education reading class taught by a reading specialist and aide. (N.T. 520, 557, 563-565, 671-672) Student's decoding is "choppy and belabored," full of errors, and she "struggles with her fluency and her comprehension." (N.T. 671 677, 679-680; SD215) Her teacher does not work with Student on decoding because the majority of students in the classroom do not have a decoding need, and the reading teacher knows that Student receives decoding instruction in the resource room. (N.T. 680-683)
10. An October 5, 2007 reading report prepared by the School District indicated that, with a 4th grade level text, Student's word recognition approached frustration and her fluency was rough, although her comprehension was adequate. (SD215) It concluded that Student's instructional reading level is 4, approaching level 5. (N.T. 676) Student's only IEP reading goal is "monitoring reading fluency," with no goal for word recognition or decoding. (SD218, p.12)
11. In comparing Student's November 2006 and October 2007 reading reports, it appears that Student has made little progress over that one year period. During that year, Student's word recognition on a level 4 text decreased by 5% in timed conditions, increased by 10% in untimed conditions, and remained the same when read in context. (P202, pp.2,3) Her comprehension increased by 10% in oral readings, decreased by 10% in silent readings, and remained the same on average (85% comprehension.) (P202, pp.2,3) Although the November 2006 reading report recommends an instructional reading level of 4.1, the October 2007 reading report does not similarly recommend any instructional reading level. (P202, pp.2,3)

12. Last year, Student's November 2006 IEP reading goal was to read unrehearsed 5th grade level material with 95% accuracy at a rate of 110 words correct per minute (wcpm.) (SD203, p.16) One year later, the October 2007 reading report noted that Student's fluency on a 4th grade level passage was "rough" and "dropped dramatically" at level 5. (P202, p.3) Yet, Student's November 2007 IEP goal was changed, albeit barely and inexplicably, from using 5th grade level material to using 5.5 level material, and increasing the fluency rate to 164 wcpm. (SD218, p.12)
13. Student has significant needs in handwriting and fine motor control, sensorimotor processing, and visual perceptual skills. (N.T. 697) Consequently, Student receives 30 minutes per week of direct occupational therapy (OT) services. Student also spends an average of 20 minutes per day on writing in her regular education English class. (N.T. 618-622) Her English teacher is aware that Student receives additional writing instruction in the resource room, but does not know specifically what Student receives. (N.T. 626-628, 640) Student does not receive push-in OT services in her English class, although her English teacher would not object to it. (N.T. 596-598, 601, 608-611, 613) The School District's OT is concerned, however, that Student would feel self-conscious if the OT worked directly with Student in her regular education class. (N.T. 603, 637, 696, 701-703, 705)
14. Student's October 2007 IEP contains social communication goals because she needs continued study in language, particularly as it refers to understanding expressions, figures of speech and other figurative language in order to communicate effectively with peers and adults. (SD214, pp. 11, 15, 16, 17) On November 7, 2007, the School District requested permission to evaluate Student's receptive, expressive and

pragmatic language needs.² (N.T. 548, 729) Inexplicably, however, on November 7, 2007, the School District removed Student's social communication goals from her IEP even without the evaluation, apparently because School District personnel believe that Student does not have any difficulty with pragmatic language. (N.T. 540-541, 550, 558, 660-662, 686-687, 692-693, 726; SD218) Nevertheless, a speech therapist visits Student's resource room and works on specific lessons with the entire class "so that all the students are, in essence, receiving speech therapy." (N.T. 653) The School District has not considered push-in speech therapy services in Student's regular education classes. (N.T. 692-693)

15. 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)
16. 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

² Student's parent denied the request on January 15, 2008. (SD227)

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)

17. Student’s parent requested this due process hearing on November 15, 2007. (Parents’ post-hearing memorandum, p.1) The position of Student’s parent is somewhat confusing. She appears to want Student to be mainstreamed in all regular education classes and to not miss any special subject area classes. (N.T. 568-569, 586) She also appears to want Student to receive reading instruction from a reading specialist in a classroom with a 3:1 student: teacher ratio. (N.T. 564, 572) The School District appears to defend its proposed program and placement, and notes that Pennsylvania only requires that students have “some experience” in special subject areas. (N.T. 461-462)

18. 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.³

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 addition, Student does not receive push-in OT services in her English class, although her English teacher would not object to it. (N.T. 596-598, 601, 608-611, 613) The School District OT's concerned that Student would feel self-conscious if the OT worked directly with Student in her regular education class appears to be speculative, rather than data-based. (N.T. 603, 637, 696, 701-703, 705)

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

³ 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.

School District has not satisfied its Oberti/ Girty “serious consideration” requirement. Artificially restricted consideration is not “serious consideration.”

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.

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 various areas of need.⁴ 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.

Reading

I agree with parent’s concerns regarding Student’s reading instruction. There appears to be no systematic response to the data concerning Student’s reading decoding and fluency needs. Although her comprehension is her strongest reading component, her decoding and fluency needs should be addressed more seriously.

⁴ 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)

In the year between Student's November 2006 and October 2007 reading reports, it appears that she made little progress in reading. (P202, pp.2,3) Although the November 2006 reading report recommends an instructional reading level of 4.1, the October 2007 reading report fails to recommend any instructional reading level. (P202, pp.2,3) Although Student's November 2006 IEP reading goal was to read unrehearsed 5th grade level material with 95% accuracy at a rate of 110 wcpm (SD203, p.16), her October 2007 reading report (one year later) noted that Student's fluency on a 4th grade level passage was "rough" and "dropped dramatically" at level 5. (P202, p.3) Yet, Student's November 2007 IEP goal was increased, albeit barely and inexplicably, from using 5th grade level material to using 5.5 level material, and the expected fluency rate was increased, inexplicably, to 164 wcpm. (SD218, p.12)

The reading fluency achievement data do not support the IEPs' fluency goals. Further, the word recognition data (word recognition approached frustration at 4th grade level [P202]) suggest that an explicit decoding goal may also be required. Thus, I conclude that the School District's proposed IEP is inappropriate in addressing Student's reading needs. I will order that Student's IEP be revised to provide more systematic reading instruction in all components of reading.

Social and Communication Goals

Student has been diagnosed with social behavior deficits that meet the criteria for an autism spectrum disorder. (SD216, p.2; N.T. 520) Not surprisingly, her October 2007 IEP contained social communication goals because Student needed continued study in language, particularly as it refers to understanding expressions, figures of speech and other figurative language in order to communicate effectively with peers and adults.

(SD214, pp. 11, 15, 16, 17) Inexplicably, however, on November 7, 2007, the School District removed Student's social communication goals from her IEP even without an evaluation, apparently because School District personnel believe that Student does not have any difficulty with pragmatic language. (N.T. 540-541, 550, 558, 660-662, 686-687, 692-693, 726; SD218) The record contains no evidence supporting such unilateral withdrawal of speech and language services. Accordingly, I will order that social communication goals be restored in Student's IEP.

Remedy

Student clearly seeks relief in the form of a less restrictive educational environment. In her post-hearing brief, she also suggests, almost half-heartedly, that she 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 she should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 2006)

In this case, I believe that the appropriate remedy for LRE failure in this case 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. 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)

For the reading program failure, I will order that the IEP be revised to include more systematic reading goals in all components of reading that systematically address all of Student's reading needs. . In addition, Student's November 2006 reading report recommends an instructional reading level of 4.1, and her October 2007 reading report (one year later) noted that her fluency on a 4th grade level passage was "rough" and "dropped dramatically" at level 5. (P202, p.3) It appears that Student made little progress in reading in the year between her November 2006 and October 2007 reading reports. (P202, pp.2,3) For this I will award 113 hours of reading-related compensatory education, comprised of 45 minutes for 180 days, less 30 days for a reasonable rectification period during which the School District could have recognized Student's lack of progress and adjusted its reading-related instruction.

In the area of Student's social communications goals, the School District inexplicably removed Student's social communication goals from her IEP in November 2007 even without an evaluation, apparently because School District personnel believe that Student does not have any difficulty with pragmatic language. (N.T. 540-541, 550, 558, 660-662, 686-687, 692-693, 726; SD218) For this FAPE denial, I will order that those IEP goals be reinstated and I will order 45 minutes of social communications skills education per week, for 16 weeks, with no reasonable rectification period since the removal of the goals could have been rectified immediately.

Conclusion

The School District has not satisfied the Oberti/Girty test because it has not accorded serious consideration to including Student in regular education special subject classes with supplementary aids and services. In addition, Student's reading fluency goal is not supported by evaluation data and she needs a decoding goal. Further, Student's social communications goals must be reinstated in her IEP.

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.
- The IEP team shall also revise Student's IEP to provide more systematic reading instruction in all components of reading. At the very least, the reading fluency goals shall be based upon systematic reading fluency achievement data, and an explicit decoding goal shall also be considered by the IEP team.
- The IEP team shall revise Student's IEP by reinstating her social communication goals.
- The School District shall provide to Student 113 hours of reading-related compensatory education.
- The School District shall provide to Student 12 hours of compensatory education in the form of social communications skills education.

Daniel J. Myers

Hearing Officer

Date: March 2, 2008

Re: ODR No. 8312/07-08 KE
Student
Tredyffrin-Easttown School District