

This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: KZ
ODR #8533/07-08 KE

Date of Birth: xx/xx/xx

Date of Hearing: May 30, 2008

CLOSED HEARING

Parties to the Hearing:

Mr. and Mrs.

Special Services Director
SDOP [redacted] Regional Office
Philadelphia, Pennsylvania 191xx

Representative:

Pro Se

Kenneth Cooper, Esquire
Office of General Counsel
440 N. Broad Street, 3rd Floor
Philadelphia, Pennsylvania 19130

Date Transcript Received:

June 4, 2008

Date of Decision:

June 14, 2008

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is a xx year old student who resides with Mr. and Mrs. (hereinafter Parents) in the School District of Philadelphia (hereinafter District). He is eligible for special education services under the classification of emotional disturbance, and attends the [redacted] Elementary school where he receives resource room level part-time learning support services. The District believes that Student requires full-time emotional support services and asked for this hearing because the Parents did not approve the proposed program and placement.

Issue

In order to receive a free, appropriate public education does Student require a full-time emotional support program in one of the settings the School District of Philadelphia has offered to the Parents?

Findings of Fact

Background

1. Student is a xx year old third grade student at the Elementary School. He is currently placed in an emotional support resource room level support program. (NT 22, 85-88; S-6)
2. On November 30, 2007 a NOREP was issued proposing part-time emotional support. On March 24, 2008 the Parents refused to approve this placement, writing, "Student is doing well in current placement. I do not want to subject him to the behaviors witnessed¹ in the ES classes". (S-5)

Emotional Disturbance

3. Student was taken to the Parents' home for adoption at birth, a few days later the biological father disrupted the adoption and took the newborn away, but the baby was returned to the Parents after two months because the biological mother and father were having difficulty managing his care. (S-1)
4. There is a history of Attention Deficit Hyperactivity Disorder in the biological mother's family. (S-1)

¹ The Parents visited a class at the A School, but this is not one of the programs currently being offered due to the Parents' objections. (NT 122-123)

5. Student was a very active baby and a “fearless toddler who climbed on anything”. (S-1)
6. In preschool Student had a difficult time with transition and frequently resisted attending. (S-1)
7. In 2003, at age four or five Student was evaluated at [agency] because of his difficulty sitting still, his impulsive behaviors, and his tendency to act out when he became upset. (S-1)
8. In January 2004 Student was diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. (S-1)
9. Records note an attempt to secure placement at [redacted] Partial Hospitalization Program in 2004, at which time Student would have been five or six years old. (S-1)
10. The kindergarten teacher reported he frequently acted silly, had behavioral control issues, had difficulty transitioning to school and would at times kick, scream and attempt to run away, would refuse to attempt written work and when upset would kick and throw things. (NT 23; S-1)
11. The first grade teacher reported that at times when he became frustrated Student would kick his desk, or hit his head, or bang his head on the desk, or leave the classroom and bang his head on the wall. (NT 23; S-1)
12. During first grade Student was referred to the CSAP process and was given some accommodations and supports in school. (NT 23-24)
13. During the first grade year Student was also taken for outpatient counseling, but as he refused to talk to the counselor the sessions were discontinued. (S-1)
14. During the first grade year Student was prescribed medication to address his ADHD (Ritalin and Focaline, but he was noncompliant with the Focaline). (S-1)
15. During the second grade year Student experienced consistent and severe behavioral adjustment issues, had limited focus and limited ability to complete tasks. (S-1)
16. In second grade (9-14-06) Student verbalized, “I’m going to kill myself if you don’t leave me alone” and then attempted to jump over the second floor railing. (NT 26-27; S-1)
17. In second grade (9-26-06) during a physical restraint to control his kicking and dangerous behavior he tried to bite and pinch the school counselor and the principal. That morning he had choked a child at recess. (S-1)

18. In second grade (10-11-06) when being removed for kicking desks Student cursed, threatened, hit, kicked and attempted to bite the school counselor. He banged his head against a desk, slapped himself and punched his knees. (S-1)
19. During one incident Student ran into webbed glass with his head and his hands and broke the glass, sustaining some injury. (NT 28)
20. In October of second grade Student was considered for the CARE (Children Achieving through Re-Education) Program, but the Parents said that his psychiatrist did not believe this program would be helpful for him. A behavior support plan was developed, the school counselor was to supervise Student's recess, and individual sessions with the school counselor would continue and address appropriate boundaries, safe play, prosocial skills and anger management. The psychiatrist put Student on new medication (Risperdal) with the plan to access wraparound services after the medication effectiveness was assessed. (S-1)
21. In second grade (11-15-06) when frustrated by a writing assignment Student cried and scratched himself with a pencil. (S-1)
22. In second grade (11-20-06) Student punched a classmate in the stomach. (S-1)
23. In second grade (12-15-06) while being removed from recess for spitting on other children Student kicked the school counselor and squeezed his genitals. He also physically assaulted the school police officer and threatened to punch his mother. (S-1)
24. In second grade (1-5-07) Student bit a peer on the arm. (S-1)
25. In winter of second grade Student was medicated with the Daytrana patch. (S-1)
26. At some point outpatient counseling resumed and Student attended sessions scheduled every other week. (S-1)
27. On an unspecified date in second grade Student is reported to have said, "I hate my life" and "Do you have a gun?" His acting out behaviors were increasing in frequency and intensity and there was a grave concern that he was a danger to himself. (NT 24; S-1)
28. Student was evaluated in second grade. The evaluator concluded that he qualified for the classification of emotionally disturbed based on a variety of factors including self-injurious behaviors, lashing out at peers, and personalizing things that were not directed at him. He shows emotional instability over a long period of time to a marked degree that adversely affects his educational performance, difficulty with peer relationships, and possible depression. (NT 24; S-1)

29. The evaluator considered an autistic spectrum disorder, but ruled out that classification based on Student's history and his behavioral presentation. (NT 40-41)
30. The evaluator recommended that Student be placed in a full-time emotional support program. The Parents did not want him placed in a full-time emotional support program. (NT 29-30)
31. Currently Student is in an emotional support program that consists of a period a day in the resource room for assistance with reading and writing. He spends the remainder of the day in a regular education classroom. He has regular meetings with the school counselor, a crisis management plan, and a behavior management plan. (NT 31-32)
32. The school psychologist does not believe that Student's current program is appropriate for him. She opined that he requires a smaller setting with a teacher who is experienced in behavior management in order to provide increased supervision and ensure his safety. (NT 32)
33. When the special education resource room teacher asks Student to do reading and writing tasks he hits himself, makes threatening remarks such as he could kill anybody he wanted and not go to "juvie" because he's under 11 years old, and repeatedly says he wants to die and that he has a horrible life. (NT 44)
34. In the resource room Student has been observed to hit and trip other students and attempted to stab a child with a pencil. (NT 46-47)
35. In his regular classroom Student is set off when he is told he can't do something such as play with his pencil or do an activity inside his desk. This can happen during any instructional area. (NT 62, 66)
36. He doesn't start out being aggressive, but he "totally escalates" to the point where the school safety officer needs to be called to the room. He will throw a book, he will run around the room, and he becomes very verbally abusive. (NT 62-63)
37. When Student starts acting out instruction in the classroom stops. This occurs three or four times a week. (NT 64)
38. As recently as May 2008 when being assisted to leave the lunchroom by the school psychologist and the speech therapist Student sat on the floor and hit his head against a partition. In the lunchroom he had struggled with the school police officer and presuming incorrectly that the officer had a gun said, "If I could get your gun I would shoot you and myself". He did not de-escalate and the crisis intervention team was called. (NT 82-83, 89-94)

39. The day before the hearing Student took offense at something the teacher said regarding homework and began pushing desks and turned a desk over. Taken to the office, he was swinging his arms, hitting himself, hitting his head against the window and a chair, and screaming things such as, "I hate this school. I don't have to listen to you. I don't have to listen to my mother. I don't have to listen to anyone". He needed to be escorted out of the building by the school police officer and the police lieutenant. After they got Student into his mother's car he ran out of the car and ran down the street, needing to be apprehended by the school counselor. (NT 94-98)
40. There have been numerous less dramatic incidents, and there are incidents serious enough for the mother to be called for disciplinary issues every couple of weeks during the current school year. (NT 98-100)
41. There is a behavior management program that entails ignoring certain behaviors, praising positive behaviors, and isolating/removing him when necessary. (NT 68)
42. Student has regular contact with the school counselor on a weekly basis, once or twice a week, individually or in a small group, for about 20-25 minutes each session. The counselor also intervenes when Student is acting out. (NT 102-105)
43. In addition to being certified as an elementary and secondary school counselor, Student's school counselor has worked with emotionally disturbed children as a TSS worker and as a therapeutic recreation specialist at a partial hospitalization program. (NT 101-102)
44. The school counselor is of the belief that Student has made no behavioral progress from September 2006 through May 2008 because he continues to have periodic outbursts that present a danger to himself and to the other children. (NT 106-107)
45. The school counselor believes that Student needs greater support than the Elementary School can provide. (NT 107)
46. The principal of the Elementary School believes that the school is not capable of appropriately programming for Student because the building does not have the therapeutic support needed when Student is in major crisis. (NT 88)
47. The District is currently proposing two classes: the first is a new contracted emotional support class, starting in September with two students, run by the [redacted children's mental health agency] at the B School. Student would be the third student in that class. (NT 111)
48. The class at B School will have up to 12 students, growing over time to 12, and is for children in the third through the fifth grades. There will be two adults in the class and another that will come into the class to provide behavioral and therapeutic support.

49. The second proposed class is at the C School. The class would have between eight and ten students with a maximum of 12 students and two adults. There is an SBBH (School Based Behavioral Health) program on site which Student could access in an emergency. (NT 113-115, 118)
50. In any of the proposed classes Student would have the opportunity for inclusion or mainstreaming into a regular education class such as math.
51. The B School has a special education teacher who is trained in Corrective Reading and the Young Wilson Foundations program. There is a teacher at C School who is certified in Corrective Reading. (NT 115-116)
52. These two proposed placements both provide the emotional support class, the opportunity for inclusion in math if appropriate and the scientifically-based reading instruction that Student requires. (NT 117)
53. The mother is not objecting to Student's receiving more emotional support. She wants what is best for the child. (NT 123-124)

Reading and Written Expression Difficulties

54. Mother, who is a former teacher, expressed some concern about Student's reading skills during first grade. (S-1)
55. The first grade teacher noted that although he did very well in math, Student had difficulty with reading and often refused written assignments. (S-1)
56. In second grade the Parents again expressed concern about Student's reading. (S-1)
57. On the evaluation in second grade, although he demonstrated definite strengths in mathematics and in listening comprehension, he had decided weaknesses in reading, especially reading comprehension, and in written expression. (NT 25)
58. Student's Full Scale IQ was 105, his standard score in reading comprehension on the WIAT-II was 66 (the school psychologist had "serious concern" about that score) and his word reading standard score was 86. (NT 35)
59. The school psychologist attributed the very poor score in reading comprehension to factors other than a specific learning disability. She said that Student believes he cannot read, is reluctant to attempt to read, will more easily engage in reading single words than paragraphs, will make self-deprecating statements about himself when asked to read and will engage in manipulative strategies to avoid reading. (NT 35-36)

60. The school psychologist did not confer a dual classification (emotional disturbance and specific learning disability) on Student because she believed that because Student's behavioral issues tended to occur around reading he was not receiving adequate reading instruction because the teachers tended to pull back and reduce demands. The teachers were less inclined to challenge Student in reading than they were in math, a subject in which he excelled. (NT 37)
61. Student refuses to do reading and writing tasks for the resource room teacher. (NT 46)
62. The resource room teacher is using the District's core curriculum to teach Student reading. She uses a computer-based program called "Let's Learn to Read" but does not know whether or not the program is for struggling readers or just addresses regular education students. (NT 49-51, 53)
63. Student's reading decoding and sight reading is one year below grade level, but he refused to engage in reading comprehension testing so his abilities on that aspect of reading are unknown. (NT 54-56)
64. In the regular education classroom during the literacy portion when Student is present the children write in their journals. Student refuses to write and instead engages in evasive behaviors. (NT 60-61)
65. In the regular education classroom when he occasionally reads third grade science texts out loud he stumbles over words. (NT 74)
66. The regular education teacher believes she saw Student's IEP at the beginning of the year but is not familiar with the document. However, she testified that she implements the IEP and she estimates that she looked at it in the last four months. (NT 75-78)

Witness Credibility

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"² or crediting evidence. Further, Hearing Officers' decisions are to "specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions".³ 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.,"⁴ Carlisle Area School v. Scott P., 62 F.3d

² Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

³ *Id.* at *34.

⁴ 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)."⁵ 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."⁶

This hearing officer provides the following determinations:

School Psychologist – This hearing officer accepts this witness's conclusions regarding Student's classification as a child with an emotional disturbance. However little weight is given to her reasons for not assigning Student the additional classification of having a specific learning disability in reading.

Special Education Teacher – This hearing officer accepts this witness's factual descriptions of Student's behavior, but finds her not to be credible on matters relating to reading instruction.

Regular Education Teacher – This hearing officer accepts this witness's factual descriptions of Student's behavior, but did not find her credible on topics related to her implementation of the IEP and Student's ability to read in her classroom.

Principal – This witness's descriptions of Student's behavior and the Elementary School's inability to provide him with an appropriate program were eminently credible.

School Counselor – This witness was quite credible on the topic of Student's needs for a higher level of support and the Elementary School's inability to provide him with an appropriate program.

Parent – The mother provided very little testimony, and as she did not contradict the District's witnesses her credibility is not at issue. Her brief statements suggested that she is not opposed to Student's receiving a part-time emotional support program, although she is concerned about the location in which such a program will be delivered.

⁵ Shore Regional at 199.

⁶ *Id.* at 201.

Discussion and Conclusions of Law

Relevant Legal Basis

In deciding this matter, the hearing officer relied on federal and state law as well as case law governing the issue in this due process hearing as set forth below.

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the District asked for this hearing, the District bears the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case.

Entitlement to FAPE

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). When a child has been found eligible for special education, the child is entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

Scientifically Based Research

IDEA 204 aligns closely to the No Child Left Behind Act (NCLB), helping to ensure equity, accountability and excellence in education for children with disabilities. IDEA 2004 addresses scientifically based research in the following context:

LEAs may carry out activities that include:

- professional development activities for teachers and other school staff to enable such personnel to deliver scientifically based academic instructional and behavioral interventions, including scientifically based literacy instruction, where appropriate...
- providing educational and behavioral evaluations, services and supports, including scientifically based literacy instruction. IDEA 2004 {(613(f)(2)(A)(B)}

NCLB defines the term scientifically based research: (A) research that involves the application of rigorous, systematic and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs; and (B) includes research that:

- Employs systematic, empirical methods that draw on observation or experiment
- Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn
- Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators
- Is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls
- Ensures experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings
- Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective and scientific review."

Discussion

Student is a child with longstanding behavioral and emotional issues, present from when he was a toddler. (FF 5) His behavior was strikingly difficult even in preschool and has continued to worsen as he has advanced through the primary grades, currently presenting a danger to himself and to others. (FF 6 to 15) This hearing officer is in full agreement and believes that the District has proven beyond any doubt that Student qualifies for the classification of emotional disturbance and also agrees that at this time he requires a small classroom setting with a teacher specially trained to address behavior management issues and emotional difficulties. (FF 16 to 46) The District is proposing two appropriate locations for delivery of an emotional support program. (FF 47 to 52)

It was clear that the mother wants what is best for her child, and although she objected to one class she visited she was open to visiting the other class that is in operation at C School. (FF 53) The B School class will be a brand new class with two or three students in September, but was not available for viewing as it is not yet open. Given Student's demonstrated emotional support needs this hearing officer will grant the District permission to place him in a part-time emotional support class. Although this may be over the Parents' objections if necessary, at the conclusion of the hearing it seemed as though the mother was amenable to the proposed level of service, suggesting that the

Parents and the District are poised to come together as partners in providing Student the emotional support program that he so clearly needs.

This hearing officer, also however, believes that there is enough evidence present in the District's testing data and in Student's behavior in school and apparently at home when he does homework, to strongly suspect that he also has a specific learning disability in reading. (FF 54 to 56) The school psychologist's explanation that his difficulties in reading are due to lack of adequate instruction because he tends to act up during reading instruction is simply not credible given his ability to exert greater behavioral control during mathematics, a subject in which he excels. It is incumbent on the IEP team to consider seriously whether Student acts up because he cannot read rather than that he cannot read because he acts up. The team may be assisted in its deliberation by results of a comprehensive reading evaluation by one of the District's certified reading specialists.

This is in no way to suggest that Student is not emotionally disturbed, or that he is emotionally disturbed because he cannot read. Student's behavioral difficulties, going back to toddlerhood and the preschool years, certainly precede any exposure to reading instruction. It is likely however that Student is an emotionally disturbed student who is also a student with a specific learning disability in reading. Even if the IEP team, after reviewing a comprehensive reading evaluation, continues to maintain that Student does not qualify for the additional classification of a specific learning disability in reading, the fact is that he cannot read at or near grade level and systematic, scientifically-based reading instruction must be written into his IEP, a plan that to be appropriate must address all Student's educational needs regardless of classification.

Order

It is hereby ordered that:

1. In order to receive a free, appropriate public education Student requires a part-time emotional support program in one of the settings the School District of Philadelphia has offered.
2. The District may place Student in one of these programs, if necessary without parental consent.
3. Within 30 calendar days of the start of school in September 2008 the District must provide Student with a comprehensive reading evaluation performed by a certified reading specialist or a teacher trained in the Corrective Reading Program and/or the Young Wilson Foundations program.
4. Within 35 calendar days of the start of school in September 2008 the District must convene an IEP team meeting to consider whether Student qualifies for the additional classification of specific learning disability in reading. Whether or not Student receives the additional classification, his IEP must be revised to include reading instruction using a systematic, scientifically-based program with built-in frequent progress monitoring that will be reported to the Parents.

June 14, 2008

Date

Linda M. Valentini, Psy.D.

Hearing Officer