

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.Z.

Date of Birth: [redacted]

Dates of Hearing:

August 15, 2008, September 18, 2008, September 25, 2008

CLOSED HEARING
ODR #8913/07-08 AS

Parties to the Hearing:

Parent

Bethlehem Area School District
1516 Sycamore Street
Bethlehem, PA 18020

Date Record Closed:

Date of Ruling:

Hearing Officer:

Representative:

Pro Se

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One West Broad Street, Suite 700
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October 5, 2008

October 19, 2008, 2008

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (Student) is a xx-year old resident of the Bethlehem Area School District (District); he is currently identified as an exceptional child, [redacted] identified with disabilities of autism and speech and language impairment. (NT 25-.) The Student is in seventh grade in the District's East Hills Middle School. (NT 28-29.) [Name redacted] (Parent) requested due process claiming that the Student's [educational program] for the 2007-2008 school year was inappropriate, (NT 61, 121-126; S-10, S-12, S-30 p. 3), requesting as a remedy that the District pay for a special program for grade school students, which is offered on line by [Redacted] University, to be provided to the Student during the summer. (NT 36, 60-61, 63-65.)

The District asserted that it had no obligation to provide the requested courses because, 1) there is no legal obligation to provide ESY services to [Student]; and 2) there is no legal obligation to provide college courses or courses that are not already offered as part of the District's curriculum for [Student]. In addition, the District defended the program and placement that it had provided to the Student.

The parent filed her Complaint for the Student by handing a note to the principal of the School on May 8, 2008. (NT 33; S-30 p. 3.) The District challenged the note's sufficiency, and the hearing officer dismissed the challenge [redacted]. (S-30 p. 4-5.)

The District thereupon filed its motion to dismiss in writing. (S-23 p. 3-7, P-1 p. 150-160, 165-167¹.) At Parent's request, this was translated into [another language]. (S-23 p. 8-11.) The Parent challenged the accuracy of the translation, (S-27-29, 32-33, P-1 p. 150-160, 165-167), and the hearing officer directed that the District make an oral motion during the hearing, to be interpreted by a qualified forensic interpreter. (NT 35-50, 60-65.) The

¹ The Parent, appearing pro se, submitted a document book paginated consecutively, without utilizing exhibit numbers. In addition, pages were two sided, with the back pages not numbered. Although this does not conform to the prescribed pagination for exhibits, in this case, due to the Parent's difficulties with English, the presence of the interpreter, and the difficulty and delay inherent in having the Parent renumber the pages in standard form, the hearing officer went ahead with the exhibits as the Parent numbered them. Thus, the entire book is numbered as "P-1 p.", with each page number representing both sides of the sheet. The hearing officer apologizes for any inconvenience this may cause.

hearing commenced on August 15, 2008. The hearing officer reserved decision on the motion and took evidence pertinent to it. (NT 65-68, 74-79.)

During the hearing on the motion, the Parent attempted to introduce evidence pertaining to the Student's disabilities and special education, to which the District objected in timely fashion. (NT 94, 101.) After the hearing, the Parent argued in an email that the hearing should encompass evidence about the disability as it pertains to the child's [special] education needs, because to do otherwise would be to consider only half of the relevant facts, and because the Student's special education needs [redacted] are interrelated [redacted]. Again the District objected to expansion of the scope of the hearing. (HO-1.)²

In a seven page ruling, the hearing officer denied the District's motion while limiting the scope of the hearing. (HO-2.) The hearing officer concluded that the Parent's complaint was about the adequacy of the District's [redacted] program and placement. He excluded from the scope of the hearing [certain] evidence regarding the Student's disabilities. He also excluded a direct challenge to the District's evaluation, but allowed the Parent to introduce [certain] evidence that the [educational program] does not address all needs identified in the evaluation [redacted].

The hearing was continued and two more sessions were held, on September 18, 2008 and September 25, 2008.³ At the end of testimony on September 25, the hearing officer reserved decision on the admissibility of documents. (2NT 600-601.) The hearing officer admitted some documents and excluded others in an email decision transmitted on October 5, 2008, (HO-3), at which time the record closed.

ISSUES

² These emails and the District's responsive emails are included here for clarity and completeness of the record, and marked together as HO-1.

³ The transcripts dated August 15, 2008 and September 18, 2008 are numbered consecutively. However, the transcript dated September 25 is numbered as if consecutively from August 15, rather than from September 18. Therefore, the notes of testimony for August 15 and September 18 will be referred to as "NT" and the notes of September 25 will be referred to as "2NT", retaining the reporter's pagination.

1. Was the District's program and placement for the 2007-2008 school year appropriate?
2. Should the hearing officer order specific programming or compensatory education for the 2007-2008 school year?

FINDINGS OF FACT

1. The Student experienced a significant speech delay, a lack of response to sounds, and a lack of eye contact in his first three years of life. The Parent obtained evaluations and therapy to address these concerns. (NT 85.)
2. The Student's reading skills were above grade level during his kindergarten year. (NT 86-87.)
3. The Student has advanced skills in mathematics, reading and science. (P-1 p. 1-59, 106.)
4. The Student's scores in reading, while advanced, have provided evidence of skills in reading that are less advanced than the Student's mathematics skills. (S-5.)
5. In September 2007, the Student's scores were not advanced in reading and mathematics. (S-5 p. 3.)
6. [Redacted.]
7. [Redacted.]
8. [Redacted.]
9. In planning his program and placement, the District considered the Student's rates of acquisition and retention, subjectively. (2NT 305-306.)
10. Rates of acquisition and retention were not stated [redacted]. (2NT 305-306.)

11. [Redacted.]
12. The Student's advanced track allows him to learn with other students with similar levels of skill in mathematics, reading and science. It permits the Student to learn more rapidly than in an average general education population. (NT 422-423, 2NT 445-447; S-12 p. 5-6.)
13. The advanced tracking of students allows for deeper and broader approaches to the same curriculum taught in the non-advanced tracks, along with activities aimed at practical application of learned skills, and condensing of scope and sequence to allow preparation for higher grade curriculum. (NT 174-178, 194-198.)
14. [Redacted.]
15. The Student was assessed with the SOI in September 2007. (NT 171-172.)
16. The Student was assessed with a curriculum based assessment instrument called 4Sight as well as with the PSSA. 4Sight is administered at the beginning of the school year, in January and in May. It provides benchmarks of progress in the sixth grade curriculum. (NT 179; P-1 p. 27, 91-93.)
17. The 4Sight test does not prove mastery of the entire curriculum; rather, it provides diagnostic information about the student's degree of exposure to concepts and skills in that curriculum. Thus a score of Advanced does not prove that the student does not need teaching in the curriculum. Conversely, a lower score indicates the need for further learning in the curriculum. (NT 420-421, 437-438.)
18. The SOI data were not reported in the Present Levels section of the IEP, in drafts during the Fall of 2007, or in the final offered version in November 2007. (S-5, S-10, S-12.)
19. The 4Sight ratings and PSSA results were reported in the Present Levels section of the IEP. (S-5, S-10, S-12.)

20. The Student's 4Sight scores in September included ratings of Basic in algebraic concepts, Proficient in data analysis and probability, and Below Basic in open ended questions. His total score and PSSA correlation were Proficient, on a scale whose highest score would have been Advanced. (S-16 p. 1.)
21. In October, the IEP team decided not to accelerate the student in Mathematics because his 4Sight scores were not Advanced, and based upon other reports by his teachers. (NT 409-412, 414-427.)
22. Teachers reported that the Student was demonstrating gaps in his knowledge and skill in various areas, especially written expression, and was not accelerated in all areas. 4Sight testing confirms that the Student's performance in mathematics and reading was not consistently Advanced. (NT 428-430, 2NT 399-400, 2NT 449-460; S-12, S-14.)
23. Teachers reported that the Student was engaged in learning at the sixth grade level in all subjects. (NT 431-434, 2NT 273-279, 509-510; S-12.)
24. The District considered the Student's social and developmental needs for placement in an age-appropriate class in determining the Student's placement. (NT 214.)
25. By a series of emails early in the school year, beginning on September 24, 2007, and in IEP meetings in September, October and November, the Parent notified the District that the Student was bored at school and indicated that he was not motivated or challenged by the curriculum offered to him in sixth grade, particularly in mathematics. (NT 336-344, 405, 409; S-5, 10, 12.)
26. In October 2007, the District's audiologist observed the Student pursuant to his IEP, and noted instances of lack of attention to task and some behavior problems. (NT 365-375; P-1 p. 60-63.)
27. By January 2008, the Parent concluded that the Student was not challenged by the sixth grade curriculum, even though the Student was placed in the accelerated track "A". The Parent attempted to assess the Student herself, using curriculum based assessments in

the Student's text books. The Parent then asked the teacher to assess the Student, and asked the District to consider placing the Student in seventh grade mathematics classes. The District responded in early March, but did not schedule a meeting until April 11. (NT 113-115, 393-395; P-1 p. 76-77, 80, 84, 93.)

28. The Student reached a rating of Advanced in the 4Sight test administered in January 2008. Teacher reports indicate that he made significant progress in sixth grade in all subjects. (2NT 309-311, 393; S-16 p. 2.)
29. In March and April 2008, the District tested the Student in seventh and eighth grade mathematics by administering the 4Sight test for the curriculum in these grades. (NT 179-180, 211-212, 435-437; P-1 p. 27.)
30. In March and April 2008, the Student was tested to find his instructional level in reading through the Qualitative Reading Inventory. He was placed at a seventh grade, 3 months level. This did not indicate that he was placed inappropriately in sixth grade, track "A". (NT 212, 442-448, 2NT 271-272; P-1 p. 28, 138.)
31. The Student's teachers reported in March 2008 that the Student was advanced enough in mathematics to be able to handle a seventh grade mathematics course. (NT 436-439; P-1 p. 27.)
32. The District attempted to promote the Student into eighth grade for mathematics while he was in his sixth grade year, but was unable to do so because of scheduling conflicts. (NT 105-115.)
33. In April 2008, the District placed the Student in a seventh grade mathematics class that is on its "track B" – the middle of three tracks that differentiate students by how quickly they learn the curriculum. (NT 137, 181; P-1 p. 106.)
34. Teachers reported that the Student was engaged in learning in the seventh grade class. (NT 439-440, 2NT 279.)
35. The District suggested that the Parent provide advanced summer courses for grade school students offered by a local community

college, but it did not offer to provide such courses. (NT 115-120, 146-149, 162-163, 201-202, 210-211, 220-223.)

36. Such courses are not part of the curriculum of the District's Middle School. (NT 186-191.)

37. The Parent requested on-line courses [redacted] provided through [Redacted] University. Such courses are taken by computer while the student is at home, or in another setting which is not a school setting. (P-1 p. 97-106; P-1 p. 106-111.)

38. The Parent wants the on-line courses to serve as a form of compensatory education to make up for the perceived lack of appropriate programming during the Student's sixth grade year. (P-1 p. 99 through 106.)

39. The Parent seeks mathematics education for the Student with a curriculum that matches the level on which he is capable of functioning. (NT 163.)

40. On May 5, 2008, the District declined to provide on-line courses to the Student as requested by the Parent, and offered to test the Student to determine his appropriate mathematics placement. (P-1 p. 111.)

41. In June, the District offered testing for an accelerated mathematics course. (2NT 268-271; 2P-1 p. 149.)

42. For the 2008-2009 school year, the Student is placed in an algebra class at the seventh grade level. (2NT 268-271.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two

contending parties must bear the risk of failing to convince the finder of fact.⁴ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence⁵ to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail.

In the present matter, the hearing officer assigned the burden of persuasion to the Parent. The IDEA and Shaffer v. Weast do not govern here, but the Weast decision is instructive, since it emphasizes that the general rule places the burden on the party requesting relief. Moreover, several appeals panel decisions agree that it is appropriate to place the burden of persuasion upon the Parent in [similar] cases. See e.g., In re Educational Assignment of A.H., Spec. Educ. Op. 1787 at 5 (December 20, 2006). Thus, if the evidence is in “equipoise”, the Parent will not prevail.

[Redacted.]

PROGRAM AND PLACEMENT

The hearing officer finds that the program and placement offered to the Student in the 2007-2008 school year was sufficient to meet the above,

⁴ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

⁵ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

minimal standards set by Pennsylvania law. The program was reasonably calculated to provide the Student with meaningful educational benefit. (FF 9, 11, 12, 23, 28, 34.)

Contrary to the Parent's arguments, the only evidence of record shows that the Student, though highly advanced in all areas, (FF 1-329, 31-33, 42), still had things to learn from the sixth grade curriculum. His 4Sight testing at the beginning of the year showed that he could still advance in the sixth grade curriculum's content areas of algebraic concepts, data analysis and probability, and open ended questions. (FF 16, 20, 22.) In reading, the Student was shown to be proficient, but not advanced, in comprehension, analysis and open ended questions. (FF 2, 4, 22, 30.) His teachers, who had the benefit of seeing him perform in class every day for about a month, reported their professional observations of generally excellent skills, but some flaws which needed attention at the sixth grade level. (FF 22.) So the record supports the District's contention that the Student needed placement in a sixth grade curriculum for all subjects at the beginning of the year.

There were additional considerations for placement. The Student's social and developmental needs argued in favor of keeping him in sixth grade. (FF 24.) His disability needed to be factored in also. Thus, the District did not act carelessly by moving slowly to accelerate the Student. On the contrary, it took due care for the totality of his needs. Indeed, a preponderance of the evidence proves that the Student did learn meaningfully in sixth grade, in the areas of mathematics and reading, the two primary areas in which the Parent asserts the need for acceleration. (FF 23, 28, 30, 42.)

The Parent urges this hearing officer to infer that the Student failed to receive meaningful educational benefit during the 2007-2008 school year because his mathematics skills were advanced beyond the eighth grade level at the start of the year, he did not receive acceleration until April 2008, and that acceleration was not sufficient. She bases this on several pieces of evidence, which taken together she argues raise an inference of a failure to provide meaningful benefit.

First, the Parent provides numerous scores, privately obtained, which show the Student to be performing in the superior range across the board. (P-1 p. 1-28.) The hearing officer cannot give weight to these documents as raising an inference about the Student's functioning during the 2007-2008

school year because they were administered after that year. (NT 383-384.) These scores cannot prove that he did not make progress in that year. In addition, they are nationally normed scores and cannot measure the Student's achievement within the curriculum of his sixth grade and seventh grade classes in the District. (2NT 281.)

Second, the Parent testified that she had private friends who tested the Student at an undisclosed time and told the Parent that the Student was already advanced beyond the sixth grade curriculum. (NT 385-386.) This testimony is insufficient to prove that the Student did not benefit, because the scores were not given in testimony, the person who reached this conclusion did not testify, and the date of the test results is unknown.

Third, the Parent relied upon the Student's report card for sixth grade, in which he received a B instead of an A. He finished with an A. (NT 404-405.) These grades are consistent with the Parent's assertion that the Student underperformed because he was not sufficiently challenged. However, they are also consistent with various other hypotheses, including difficulty with the material for part of the year, or difficulty due to the Student's learning disability. Thus, they do not suffice to prove that the Student was inadequately challenged, even when taken together with other evidence.

The Parent challenged the validity of the [certain] test results [redacted]. The hearing officer does not accept this argument. [Redacted.]

As to the validity of the QRI reading test results, the Parent suggests that the Student's disabilities might have influenced his scores. However, again she offers no more than speculation to that effect. The District shows that the QRI was administered appropriately by a trained individual; this raises a presumption that the scores are valid, and there is no evidence to challenge this presumption. Moreover, teacher reports and the Student's performance in reading were also considered and were not inconsistent with the test scores. (2NT 320-330.)

The District showed that its program for the Student provided him with the opportunities that the law requires [redacted.] While the Parent argues that the seventh grade math placement was inadequate, (FF 32), she produced no evidence to prove that contention. On the other hand, the

District produced testimony that the Student was appropriately placed in the seventh grade math class. (FF 31, 34, 41, 42.)

The District also proved by a preponderance of evidence that its staff individualized the Student's program, even though his placements were generic in nature. His individual profile of mathematics strengths and weaknesses was tested, and the math teacher differentiated his instruction accordingly. (FF 11, 16, 19, 20.) [Redacted.] A preponderance of the evidence demonstrates that the District met the Student's educational needs. The Parent's argument amounts to a request for individual programming in a curriculum that exceeds what the District offers. (FF 35-40.)

IEP DEFICIENCIES

The hearing officer, while agreeing with the District that it provided an adequate program, feels constrained to observe that the IEP in this case is not adequate. See generally, In re Educational Assignment of D.D., Spec. Educ. Op. 1791 (January 9, 2007). While the Present Levels section of the IEP does reflect the Student's base line functioning in his areas of need – especially mathematics and reading – the test scores are reported in summary form, without the detailed breakdown that the District had at its disposal. (S-12, S-16.) Thus, while there were base lines from which the District individualized the Student's education, the IEP does not reflect them in sufficient detail to provide base lines for programming. (FF 9, 10, 15, 16, 18, 19, 20.)

The goals in this IEP are most difficult to decipher; they are set forth in the most general terms, and the Parent can hardly be expected to be able to understand specifically what changes in the Student's skills are contemplated. Of greater concern is the fact that neither the goals nor the objectives are stated in quantifiable terms. Consequently, there is no clear provision for data driven progress monitoring.

In the absence of data driven progress monitoring, the District was slow to respond to the Parent's concerns. (FF 25-33.) Nevertheless, this delay in response does not prove a delay in addressing the Student's needs. There is ample evidence that the District had reason to believe that the Student was progressing in the advanced track of the general education sixth grade curriculum, (FF 28), until the Parent showed evidence in February that the Student knew much if not all of the mathematics curriculum. (FF 28-

31.) From that point, there was some delay due to emails not being received, but within two months, the District had tested the Student, teachers had consulted, and the principal decided to place the Student in an accelerated mathematics class. (FF 32-33.) One may speculate that a better IEP would have alerted the teachers sooner that the Student was ready to be accelerated, but there is no evidence to show that this is true. Thus the record does not support this hypothesis by a preponderance.

Regardless, a deficient IEP does not amount to a denial of the educational services required under [the law]. Here, the hearing officer finds that, despite the inadequate IEP, the District provided an adequate program [redacted] in an appropriate placement. Therefore, the deficiencies in the IEP are not prejudicial, In re Educational Assignment of E.D., Spec. Educ. Op. 1564 at 8 n. 49 (January 10, 2005). The Parent's request for an order for specific [educational] programming is denied.

ORDER

1. The District's program and placement for the 2007-2008 school year was appropriate.
2. The hearing officer will not order specific programming or compensatory education for the 2007-2008 school year.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

October 19, 2008