

This is a redacted version of the original decision. Select details 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

Child's Name: OC

Date of Birth: xx/xx/xxxx

Dates of Hearing: August 25, 2008

CLOSED HEARING

ODR No. 8937/07-08 AS

Parties to the Hearing:

Parent

School District
Philadelphia

Representative:

Parent Attorney:
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Date Record Closed: September 2, 2008

Date of Decision: September 17, 2008

Hearing Officer: Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is a student with severe disabilities, including mental retardation, speech/language impairment and intractable epilepsy, which required a partial right frontal lobectomy to control frequent seizures. Now nearly [a young teenager], Student has been enrolled in the Philadelphia School District since the age of five, when his Parents moved to Philadelphia from [outside the United States] to seek better medical care and educational services for him.

Student's Mother filed a due process complaint in June 2008, requesting Spanish language instruction for Student, as well as compensatory education for the District's decision not to place him in a bi-lingual educational setting, or provide any Spanish language instruction, for several years. Parent asserts that the lack of instruction in Student's native language and lack of opportunity to interact with Spanish-speaking peers since the beginning of second grade, when he was first placed into a life skills program, resulted in no measurable progress toward the functional, speech/language and academic goals in his IEP.

The parties agreed that the critical issue to be determined for the 2008/2009 school year is whether Student should have daily academic instruction delivered in Spanish by a teacher or paraprofessional. Although Student is currently in a bi-lingual class which affords him daily interaction with Spanish-speaking peers, instruction is delivered entirely in English. The parties further agreed 1) that an independent evaluation should be conducted by a bi-lingual school psychologist, (completed in July 2008); 2) that an initial hearing session, limited to the issue of daily instruction in Spanish, should be convened as soon as the evaluation report was made available to and reviewed by the School District; 3) that a decision should be issued on that claim, while deferring the hearing on other issues to a later session or sessions. Accordingly, the

hearing session devoted to bi-lingual instruction was held on August 25, 2008, and this decision is limited to determining that issue.

ISSUE

Should the School District of Philadelphia be required to provide daily instruction to Student in Student's native language, Spanish, as well as in English?

FINDINGS OF FACT

1. Student is a pre-teen child, born xx/xx/xxxx. Student is a resident of the Philadelphia School District and is eligible for special education services. (Stipulation, N.T. pp. 15, 16).
2. Student has a current diagnosis of Mental Retardation and Other Health Impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(6), (9), (11); 22 Pa. Code §14.102 (2)(ii). He also has a significant speech/language impairment (N.T. pp. 57—61, 64; P-2, P-5, P-6).
3. Student's native language, and only functional language, is Spanish, which is spoken at home. His family moved to Philadelphia from [outside the United States] when Student was five years old because of Student's disabilities. Student first enrolled in the Philadelphia School District at that time, where Student was initially placed in a regular, bi-lingual kindergarten and then first grade. (N.T. pp. 131, 142—144, 159, 160; P-2, P-5, P-6).
4. Student's current placement is in a life skills classroom in the [Redacted] School, a bi-lingual school within the District, where his chronological level for the 2008/2009 school year is Grade 7. Student has been receiving life skills support since second grade, and that is an appropriate placement for Student. Student has not, however, received bi-lingual instruction in any life skills placements in several different school buildings, and has received speech-language therapy in English only. Student has, at times, been provided with ESL instruction, but Student's current IEP, dated 11/09/07, provides for no ESL instruction. (N.T. pp. 16, 17(Stipulation), 64, 124, 138, 145—147, 156, 184, 185, 193, 194; P-2, P-5, P-6).
5. Due to her concerns about Student's progress in school during the years Student was provided with English instruction only, Student's Mother obtained an independent evaluation by a pediatric neuropsychologist in November 2007, which was conducted in English with the assistance of a Spanish-speaking post doctoral fellow and a Spanish interpreter. (N.T. pp. 33, 41—43, 44, 47, 56, 78, 79, 85, 94, 148, 149; P-2)
6. The School District agreed to fund an independent evaluation by a Pennsylvania certified, bi-lingual school psychologist in July 2008, during which standardized tests were administered to Student in Spanish, English or both languages. The examiner was able to, and did speak

directly to Student in Spanish. Although the standardized test results were similar to those obtained in November 2007, the bi-lingual evaluator found that Student was focused, attentive, motivated and able to engage in conversation with her. (N.T. pp. 111, 113--119, 121, 124, 125, 195; P-5)

7. A bi-lingual District school psychologist conducted an evaluation, limited to a review of records, in August 2008, but has never met Student. (N.T. p. 224; P-3).

8. With standardized intelligence test results indicating that Student is moderately mentally retarded, Student has serious cognitive impairments in all areas of functioning, but speech/language and attention problems predominate. (N.T. pp. 48, 52, 102, 132, 136, 137, 139; P-2, P-5, P-6).

9. Student's language skills are very limited, in Spanish as well as English. In the independent evaluations conducted in November 2007 and July 2008, as well as the District evaluation conducted in June 2006, Student was found to have little ability to understand and respond accurately to tasks presented in either language, but less ability to respond, even non-verbally, to questions and directions presented in English. Student's ability to respond verbally, or initiate speech in Spanish, are quite limited, but has demonstrated no generalized ability to respond verbally or speak spontaneously in English. (N.T. pp. 47, 56, 57--61, 79, 80, 90, 95—97, 119—123, 129—132, 135, 136; P-2, P-5, P-6).

10. Although Student's receptive and expressive language skills are severely impaired in both Spanish and English, Student has demonstrated a limited ability to understand and respond to questions and directions spoken in Spanish. Student's comprehension of spoken English is questionable. It is not certain whether Student is able to respond at all to directions spoken in English without visual cues. In the July 2008 bi-lingual evaluation, Student's English language skills were at the approximate level of a two year old, while Student's Spanish language ability is at approximately the level of a four year old child. (N.T. pp. 54, 56, 61, 64, 65, 90, 91, 120—123, 125, 129—131, 175; P-2, P-5, P-6).

11. Because of Student's limited cognitive potential and significant language impairments, Student's ability to learn and to develop language skills, as well as functional, adaptive and pre-academic skills when instructed solely in English is further depressed, resulting in an extremely limited ability to make progress in every area of Student's life skills curriculum and/or in speech/language therapy. (N.T. pp. 64--68, 71, 89, 93, 102, 103, 124--126, 133, 136—138, 175; P-2, P-5).

12. In light of Student's cognitive limitations, Student cannot be expected to develop academic skills beyond a third-grade level. Even with an optimal educational outcome, Student will need ongoing supervision and support, but might be able to master self-care skills and engage in supported employment. (N.T. pp. 52, 53, 55, 56, 89, 124; P-2).

13. Student continues to experience epileptic seizures, which now occur most frequently during the night. After the seizures, Student experiences fatigue, lethargy and inability for function for several hours. Student frequently cannot attend school the day a seizure occurs

because of the time needed to recover. Over the years, Student has missed a significant amount of school (N.T. pp. 62, 63, 86, 87, 158, 160, 216, 229; P-2, P-3).

DISCUSSION AND CONCLUSIONS OF LAW

In order to assure that an eligible student receives a “free, appropriate, public education” (FAPE) in accordance with the IDEA statute and regulations, school districts must provide specially designed instruction and other services which are “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible student’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the student’s IEP must specify educational instruction designed to meet the unique needs of the child and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

The court’s decision in *Marple Newtown School District v. Rafael N.*, 2007 U.S. Dist. LEXIS 62494 (E.D. Pa. 2007), gives additional content to the foregoing principles when an eligible student’s native or dominant language is not English. In that case, the court noted at *15 that the IDEA regulations “require an IEP team to take the language needs of a child into account. 34 CFR.§300.324(a)(2)(ii).” The court concluded that the school district “denied Student FAPE because Student’s IEP was not reasonably calculated to address his language needs and ensure he receives a meaningful educational benefit.” (LEXIS 62494 at *24).

The *Marple Newtown* case is very similar to this one in terms of both the disabilities and educational issues involved. Here, over a period of five school years, and now into the sixth, the District has provided Student with a program and placement that relied on English instruction, exclusively, and only recently placed him in a school where he can interact regularly with Spanish-speaking peers. (F.F. 4)

The evidence in this case is overwhelming that despite nearly exclusive exposure to English while in school, Student has acquired no real ability to comprehend and use the English language. (F.F. 3, 9, 10). Within the past year, two independent evaluators concluded that Student has significantly impaired speech/language skills in Student's native language, Spanish; that Student has acquired, at best, very little understanding of English; that Student engages in no spontaneous speech in English. (F.F. 9). The test results, and particularly the observations of the evaluators are uncontradicted by the District's evidence. The District's only response to the two independent evaluations was a review of records evaluation by a bi-lingual District school psychologist who never met Student. (F.F. 7). Moreover, that report was obviously designed to support the District's underlying position that Student's instruction should be delivered only in English, since it consisted primarily of a critique of the conclusions reached by the independent evaluators. (*See, e.g.*, P-3 at pp. 5--7)

I find that the District's August 14, 2008 Psychological Review/Reevaluation is entitled to no weight in these proceedings. Since the District psychologist never met the student, and did not even review Student's IEPs in depth, his rejection of the conclusions of the psychologists who actually tested and observed Student, and his own interpretation of the import of the evaluation results, are based upon nothing more than conjecture and speculation. (N.T. pp. 124, 242; *See also, e.g.*, N.T. p. 230, l. 17, 18: "maybe he is learning to his potential." p. 235, l. 10,

11: “I think maybe he can learn that (the color yellow) without this emphasis that Spanish should be given.”)

Notwithstanding the overwhelming objective evidence that Student has been largely, if not entirely, unsuccessful in learning English, and despite the statements in Student’s most recent IEP that he “communicates verbally in Spanish” and has “no functional English vocabulary to express his needs” the IEP also states that “Student does understand much of the English spoken in class.” (See P-6, p.6) There was, however, not a shred of evidence to support such an inference—no examples demonstrating his understanding of spoken English were presented either in the IEP, other documents or testimony. Nevertheless, the District took the position that Parent’s request for an order that Student be provided with instruction in Spanish is premature, in that the IEP team has not yet had the opportunity to review and consider the most recent evaluation results.

There are two major problems with the District’s position. First, Parents obtained the independent evaluation by Dr. F in November 2007. (F.F. 5). There was more than ample time between then and the date Student’s Mother filed the due process complaint in June 2008 for the IEP team to have considered those evaluation results, obtained an independent and/or District provided bi-lingual evaluation, and proceeded with the same IEP team meeting it now considers so important. The District, however, took no such actions until after the due process complaint was filed and a hearing date set. Only then did the District seek additional evaluations and plead for time to allow the IEP process to be fully implemented.

Second, the teacher comments included in the November 2007 independent evaluation (P-2, p. 4) and the testimony of the district witnesses, particularly the school psychologist, leave the definite impression that the IEP team is highly unlikely to conclude that Student should be

instructed in Spanish. The School District has resisted providing Student with instruction in Spanish primarily because it purportedly believes that Student could not be as successful in the predominantly English-speaking community if Student does not learn English. The District, however, did not explain how and why this Student will suddenly begin learning functional personal and academic skills via continued instruction in English when Student has had little success learning those skills with English-only instruction to this point. Moreover, this Student, with seriously impaired language skills in Student's native language, is not even being provided with ESL instruction to bridge the language gap. The District, in essence, has expected a cognitively impaired adolescent Student in a life skills program, with the language skills of a four year old in Student's native language, to learn English by immersion, when it presumably provides ESL instruction to non-English speaking students with average intelligence and language skills.

After taking that position for all of the years that Student has been in a life skills class without seeming to consider that it flies in the face of common sense, the District insists that the IEP team be given the opportunity to make recommendations concerning Student's need for instruction in Spanish. Moreover, the only member of Student's current IEP team identified by name is the school psychologist who testified at length and in detail concerning his extensive disagreement with the independent evaluators' purportedly flawed analysis of their own test results, and their conclusions that Student needs and would benefit from instruction in Spanish. It is difficult to imagine the District members of the IEP team suddenly undergoing a complete change of philosophy with respect to the issue whether Student should receive instruction in Spanish.

The inference drawn from the District's purported concern that Student will not be successful if Student does not learn the dominant language of his community, is that the District really does not believe Student can achieve any real success in school regardless of the language in which Student is taught. The school psychologist's comment that "maybe Student is learning to his potential" (N.T. p. 230, l. 17, 18) is telling. As noted, however, he never met, much less interacted with Student. (F.F. 7).

Of greater significance is the contrast between the observations of the two independent evaluators. Dr. F noted in his evaluation report that Student's attention problems, activity level and impulsivity required non-standard administration of some portions of the tests. *See* P-2, p. 4. Dr. G, however, reported and testified that Student was focused, motivated and cooperative throughout the testing. P-5, p. 4; N.T. pp. 118, 119. The difference between the evaluators is that Dr. G spoke directly with Student in Spanish, while Dr. F needed to use an interpreter or a Spanish-speaking assistant to communicate with Student. (F.F. 5, 6). The marked differences in Student's demeanor and ability to stay on task in the two testing situations, as reported by the evaluators, certainly suggests that instruction in Spanish should be tried to determine whether Student's behavior and attention improve, and whether Student can make greater progress when Student is instructed in Spanish by either a teacher or a paraprofessional, who can provide direct instruction to Student under the close supervision of a teacher.

The testimony of both independent evaluators was impressive and credible. Moreover, their recommendations are consistent with their test results, and with each other, and are both practical and sensible. As Dr. F noted, it would certainly be much better for Student in the long run to learn English, but it is essential for Student to learn functional and personal maintenance skills, and those should be the first priority. *See*, N.T. pp. 66, 67. Student should be taught in

Spanish to at least determine whether Student can make greater progress toward mastering such skills. Similarly, it is most important for Student's language skills to improve, and the best chance of accomplishing that is to focus on improving Student's receptive and expressive skills in the language in which Student has already developed some facility, however limited. Dr. G likewise recognized that Student needs to learn English, but sensibly noted that Student needs specialized instruction in English while improving Student's overall ability to use and understand language, which is best accomplished by speech/language therapy provided in Spanish, the only language in which Student is even minimally able to function.

CONCLUSION

Based upon the foregoing analysis of the record, I conclude that Student cannot achieve significant learning and meaningful progress, as required by IDEA, if Student continues to be instructed solely in the English language. Accordingly, the School District will be required to provide Student with instruction in Spanish by a teacher or paraprofessional, not translated English instruction. To address Student's seriously impaired language skills, the District will also be required to provide Student with speech/language therapy in Spanish as well as English. Finally, as in the *Marple Newtown* case, the District will be ordered to provide Student with appropriate, specially designed ESL instruction which takes into account Student's limited cognitive potential and significant speech/language impairment. As the District's school psychologist noted in his testimony, there will be no "magic" transfer of the skills Student learns in Spanish to English. (N.T. p. 225, l. 12) Student need to be specifically taught English, and it is the School District's responsibility to provide him with appropriate instruction and related services that will allow Student to make reasonable progress in overcoming Student's

speech/language disability, in acquiring functional life skills, and in understanding and speaking English to the extent Student is capable of doing so.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District of Philadelphia is hereby **ORDERED** to take the following actions:

1. Provide Student with direct, daily instruction in Student's life skills curriculum in the Spanish language. Such instruction shall be provided by a certified teacher or by a paraprofessional under the direction and supervision of a certified teacher.
2. Provide Student with bi-lingual speech/language therapy that includes direct, one on one services delivered by a bi-lingual speech/language therapist.
3. Provide Student with specially designed ESL services to teach Student the English language, taking into account Student's cognitive and language impairments.

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

September 17, 2008