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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: CV

Date of Birth: xx/xx/xx

Date of Hearing: October 17, 2008

CLOSED HEARING

ODR Case # 9061-08-09 -LS

Parties to the Hearing:

Mr.
Ms.

Mr. Phillip Andras
Director of Special Education
Williams
Shenandoah Valley School District
805 West Centre Street
Shenandoah, PA 17976

Representative:

Pro Se

Thomas Warner, Esquire
Sweet, Stevens, Katz &
331 Butler Avenue
P.O. Box 5069
New Britain, PA 18901

Date Record Closed:

November 3, 2008

Date of Decision:

November 16, 2008

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”) is a preschool/kindergarten age student residing in the Shenandoah Valley School District (“District”) who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)¹. The student’s parents and the District disagree over the educational placement for the student.

Parents filed a complaint on July 9, 2008. The District challenged the parent’s complaint as insufficient pursuant to 34 C.F.R. §300.508(d). On July 22, 2008, the hearing officer previously assigned in this matter ruled that the parent’s complaint was insufficient and allowed the parents thirty days to amend their complaint. (Hearing Officer Exhibit [“HO”]-1).

On August 4, 2008, parents filed with the Office for Dispute Resolution, the administrative office in responsible for overseeing Pennsylvania’s special education due process system, a document that appeared to be a subsequent complaint. (HO-2). On August 5, 2008, the

¹ It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

District again challenged this subsequent complaint as insufficient pursuant to 34 C.F.R. §300.508(d).

On August 27, 2008, the prior hearing officer ruled that the complaint of August 4th was sufficient. A hearing was scheduled for October 17, 2008. (HO-3).

In early October 2008, however, the prior hearing officer recognized that a scheduling conflict would necessitate a postponement of the hearing. To avoid that, upon the request of the prior hearing officer, this hearing officer volunteered to take over the case, to hold the hearing on October 17th, and to render a decision in the matter.

A one-session hearing was held on October 17, 2008. Written closing arguments were due from the parties, and the record therefore closed, on November 3, 2008. Both parties filed timely closing arguments.

This decision is being issued on November 16, 2008. For the reasons set forth below, I find in favor of the parents regarding the educational placement of Student .

ISSUE

Is the appropriate placement for the student a life skills classroom operated by the District, or a life skills classroom operated at the local intermediate unit (“IU”)?

FINDINGS OF FACT

1. The student is a preschool/kindergarten aged child residing in the District. For the purposes of this hearing, the parties have stipulated that the student's appropriate placement will be a life skills classroom. The student currently attends an early intervention program offered at [redacted] and operated by the IU. (School District Exhibit ["S"]-2 at page 22, S-3 at page 1-2; Notes of Testimony ["NT"] at 20-21, 49).
2. The student is diagnosed with a congenital heart ailment. Testing as part of an evaluation report ("ER") issued in May 2008 showed that the student performed below age expectations in pre-academic skills, with scores across various instruments consistently in the low or extremely low ranges. (Parents' Exhibit ["P"]-1; S-3 at pages 5-7).
3. The student's treating cardiologist has made a general statement that the student's "heart condition places [Student] at risk for sudden and dangerous cardiac events." (P-1).
4. The student is accompanied by a nurse during school hours. The nurse administers nutrition and medicines injected through a gastro-intestinal tube and also intermittently monitors the

5. The student has attended the [redacted] placement for the past two years, a program for young children with disabilities. An individualized education plan (“IEP”) for early intervention was last developed in May 2007 for use in the 2007-2008 school year. (S-1; NT at 33, 50).
6. The early intervention IEP of May 2007 includes goals in the areas: following classroom routines, appropriate social interaction, basic shape matching, counting skills, spontaneous expressive expression, following teacher commands, demonstrate letter-sound correspondence, fine motor skills for grasp and pre-writing, self-help skills in eating and dressing, gross motor skills for functional mobility. (S-1 at pages 7-16).
7. In February 2008, the parents contacted the District about registering the student for kindergarten in the District along with a request for an evaluation of the student. (S-2).
8. The District performed an evaluation and an ER was issued on May 6, 2008. The ER found that the student was eligible for special education as a student with mental retardation and recommended a placement in a life skills classroom. Parents dispute the diagnosis but not the need for a life skills placement. (S-3 at page 8; NT at 39).

9. The student's IEP team met, and an IEP was developed on May 30, 2008. (S-4).
10. The proposed IEP of May 2008 includes the goals in the following areas: appropriate social interaction, cognitive ability in conjunction with receptive and expressive language (e.g., color identification, object identification, shape matching), number recognition and counting, demonstrate letter-sound correspondence, community-based instruction (e.g., word and symbol awareness in community settings), negotiating levels/stairs/surfaces/terrain, fine motor skills involving grasp and pre-writing skills, self-help skills in dressing, spontaneous expressive language, and following commands. (S-4 at pages 11-23).
11. The proposed IEP of May 2008 also includes related services in occupational therapy, physical therapy, and speech therapy. (S-4 at pages 24-25).
12. Accompanying the May 2008 IEP was a notice of recommended educational placement ("NOREP") dated May 30, 2008. The NOREP recommended a part-time life skills classroom in a neighboring school district. On July 3, 2008, the parents disapproved this placement and requested a due process hearing. (S-5).

13. As of the date of the hearing, the District's coordinator of special education testified that various life skills placements that were being considered in neighboring school districts are no longer available to the student. (NT at 55-56).
14. On July 25, 2008, as a result of a resolution meeting conducted between the parties pursuant to 34 C.F.R. §300.510, the District issued another NOREP, reiterating its recommendation that the student's placement should be a life skills classroom in a neighboring school district. Because life skills classrooms in neighboring districts were no longer available, the placement offered by the District is the IU program offered at the IU itself. Parents again disapproved this NOREP and expressed a wish to continue with due process. Parents made explicit that their disapproval was based on the fact that the District's proposed placement was outside of the District. (S-6).
15. The District operates a life skills classroom. It is contained in the District's one school building, which houses all students in grades K-12. (NT at 53, 63-64).
16. The students in the District's life skills classroom range in ages from nine to twelve. (NT at 54).
17. The District's coordinator of special education characterized life skills instruction generally as: "learning functional day-to-day skills, how to feed themselves, how to walk, how to talk, how to

18. Instruction in the District's life skills classroom involves both individual and group instruction. (NT at 64).
19. Other students in the District's life skills classroom receive occupational therapy, physical therapy, and speech therapy. (NT at 64-65).
20. The students in the District's life skills classroom receive instruction in the regular education setting for classes such as music, art, library, and engage in other appropriate activities in regular education environments. (NT at 65).
21. The District's coordinator of special education does not feel that the District's life skills classroom is appropriate given differences between the Student and other students in that class, specifically differences in age, academic functioning, physical size, social skills, and activities. (NT at 54-55, 69).
22. The parent offered to waive any regulatory bar to the student being educated in the District's life skills classroom with students who are more than three years older than the student. (NT at 65-66).

23. The proposed IU life skills classroom is located at the IU itself in [redacted] Pennsylvania, approximately twelve miles from the District. The transportation route would be through small towns and rural areas. (NT at 58, 66-67, 69-70).
24. The nursing care required by the student would be delivered in either the District life skills classroom or the IU life skills classroom. (NT at 43-44, 58-59, 67).
25. The occupational therapy, physical therapy, and speech therapy required by the student would be provided by IU providers under a contract basis with the District, regardless of whether those therapies were delivered in the District's life skills classroom or the IU life skills classroom. (NT at 67-68).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law.² For the purposes of this case, neither federal nor Pennsylvania law explicitly defines the term "placement". Both federal law, at 34 C.F.R. §§300.114-120, and Pennsylvania law, at 22 PA Code §14.145, require, however, that the placement of a student with a disability be in the least restrictive environment ("LRE").

Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

² 34 C.F.R. §§300.1-300.818; 22 PA CODE §§14.101-14.

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

In this case, there is no dispute that the student’s placement—a life skills classroom—will be highly restrictive and that the student’s ability to participate in the regular education setting will be limited.

Pursuant to 34 C.F.R. §300.116(b)(2-3), however, the notion of LRE for a student’s placement has additional contours:

“In determining the educational placement of a child with a disability...each (school district) must ensure that...the child’s placement...is based on the child’s IEP and is as close as possible to the child’s home.”

Additionally, to comply with LRE mandates, the school district must ensure that “unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” 34 C.F.R. §300.116(c).

It is clear, then, that in determining an educational placement for a student, a school district must consider whether the student’s IEP can be delivered in the school the child would attend if nondisabled or, failing that, as close to home as possible. In this case, the District, through the IEP team meeting, considered such placements. It found that attending the school the student would attend if nondisabled would be inappropriate and that other placements (in neighboring school districts closer to the District than the IU) were not available. It is the finding of

this hearing officer, however, that the District's life skills classroom, contained in the school building where the student would attend if not disabled, is an appropriate placement for the student. As such, the District's life skills classroom is the LRE for the student's educational placement.

Critical to this finding is that the District has the classroom in place. It is not being required to create a life skills classroom. (*See, contra, Cheltenham School District v. Joel P.*, 949 F.Supp. 346 [E.D. Pa. 1996]³). Moreover, the life skills curriculum in the student's proposed IEP is nearly identical to the life skills curriculum delivered in the IEP at the [redacted] early intervention placement. There is little doubt, then, that the student's IEP can be delivered in the District's life skills classroom. (FF 6, 10, 17). There is no dispute that the nursing services and various required therapies (occupational/physical/speech) can also be provided in the District's life skills classroom. (FF 24, 25).

Furthermore, Pennsylvania law, at 22 PA Code §14.145(1), requires that a school district ensure that "to the maximum extent appropriate, and as provided in the IEP, (a) student with a disability is educated with nondisabled peers." While the nature of the entire student population at the IU school is not clear, as a highly restrictive, non-regular education setting, the student's ability to interact on any level with nondisabled

³ In Cheltenham, the federal District Court for the Eastern District of Pennsylvania ruled that the school district did not need to create a life skills classroom to accommodate one child in the district. While the district court's opinion is not binding authority, it gives an instructive examination of issues related to LRE, especially issues related to geography regarding educational placements.

peers is likely to be very limited. In the District's K-12 building, on the other hand, the student's IEP is much more likely to allow for classes and activities where the student can interact with nondisabled peers, the very peers the student would interact with if the student were nondisabled. (*See generally* Oberti v. Board of Education of Clementon, 995 F.2d 1204, 1216-1217 [3d Cir. 1993]⁴). Indeed, the District appears to make such experiences in the regular education setting part of the IEPs for students in its life skills class. (FF 17).

While a student is not entitled to a *per se* placement in the neighborhood school and distance from the student's home is not an exclusive consideration for an educational placement, placement close to home is, in the words of the Pennsylvania Special Education Appeals Panel, a primary consideration. (*In re the Educational Assignment of A.G.*, Appeals Panel Opinion 1455; *In re the Educational Assignment of A.H.*, Appeals Panel Opinion 1724; *In re the Educational Assignment of G.*, Appeals Panel Opinion 1756).

The District cites to *In re the Educational Assignment of G.A.B.*, Appeals Panel Opinion 1467, to support its position. As stated above, while this hearing officer agrees with the notion, as stated in Appeals Panel Opinion 1467, that there is no *per se* right to a placement in a neighborhood school, the facts in the cited opinion do not, as the District asserts, mirror the facts in the instant case. In Appeals Panel Opinion

⁴ In Oberti, the federal Court of Appeals for the Third Circuit delivered a landmark decision within the Circuit regarding the provision of services in the LRE.

1467, the school district did not operate its own life skills classroom; the student’s proposed placement in a life skills classroom in a neighboring school district was therefore found to be appropriate. But the availability of a nearly identical life skills classroom in the school district was not at issue in that case.⁵

The District also relies on the provisions of 22 PA Code §14.146 (a)-(b) which state:

“The maximum age range in specialized settings shall be 3 years in elementary school (grades K-6)” and “A student with a disability may not be placed in a class in which the chronological age from the youngest to the oldest student exceeds these limits unless an exception is determined to be appropriate by the IEP team of that student and is justified in the IEP.”

Clearly, this is a mandate which seeks to limit the inappropriate clustering of students at differing developmental stages. But just as clearly, it addresses the fact that a placement falling outside of these age ranges may, under certain circumstances, be appropriate.

Critically in the instant case, the students in the District’s life skills class are all working on exactly that—basic skills, in the words of the District’s coordinator of special education, such as “learning functional day-to-day skills, how to feed themselves, how to walk, how to

⁵ In this regard, Appeals Panel Opinion 1467 is most akin to Cheltenham, cited above. In both cases, the parents requested placements in neighborhood schools, but neither of the school districts involved offered life skills classrooms. It is the critical distinction from the instant case, where a district-run life skills classroom is available.

talk, how to potty train, how to brush their teeth, how to get around the community.” (FF 17). These are the same skills, in addition to very basic pre-academic skills, that the student is seeking to obtain. (FF 10). And while parental waiver of the provisions of 22 PA Code §14.146 does not automatically dispose of the mandate, parents do not object to the age range differences in the District’s life skills classroom. (FF 22). It is the considered opinion of this hearing officer that an exception to the age range restrictions of 22 PA Code §14.146 is appropriate for the student and is justified by the program as outlined in the proposed IEP of May 2008.

CONCLUSION

There is no dispute between the parties as to the appropriateness of a life skills placement for the student. Given (1) the fact that the District is not burdened by the need to create a new and unique placement for the student, (2) the mandate that, in an appropriate educational placement, a student be given the opportunity to interact to the maximum extent possible with nondisabled peers, and (3) the fact that attending the school that the student would attend if nondisabled is a primary goal in programming for the LRE, this hearing officer finds that the District’s life skills classroom is the LRE for the delivery of the proposed May 2008 IEP. Notwithstanding the age range restrictions as those restrictions apply to the facts in the instant case, the proposed

May 2008 IEP, including the related services of occupational therapy, physical therapy, and speech therapy, as well as the required nursing services, can all be appropriately delivered in the District's life skills classroom.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, it is hereby ordered that the appropriate educational placement for Student in the least restrictive environment is the life skills classroom operated by the Shenandoah Valley School District at its K-12 school building.

The District shall make all necessary arrangements to ensure that, within 15 school days of the date of this order, the District is prepared to implement the IEP of May 2008 in its life skills classroom.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

November 16, 2008