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Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: JH

Date of Birth: XX/XX/XX

Date of Hearing: October 28, 2008

CLOSED HEARING

ODR Case # 9225-08-09-AS

Parties to the Hearing:

Ms.

Mr. Tom Kattouf
Director of Special Education
Altoona Area School District
1221 6th Avenue
Altoona, PA 16602-2427

Representative:

Pro Se

Carl Beard, Esquire
Andrews & Beard
3366 Lynnwood Drive
Altoona, PA 16603-1311

Date Record Closed:

December 3, 2008

Date of Decision:

December 16, 2008

Hearing Officer:

Jake McElligott, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (“student”) is an elementary-aged student residing in the Altoona Area 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 parent and the District disagree over the individualized education plan (“IEP”) and the educational placement for the student.

Parents filed a complaint on September 3, 2008. Following the mandated 30-day resolution period,² the hearing was held in one session on October 28, 2008.

The parent was pregnant with a high-risk pregnancy and was due to delivery a baby in the week after the hearing. To allow for time for the delivery and recovery, therefore, written closing arguments were due from the parties, and the record therefore closed, on December 3, 2008.

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

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.

² 34 C.F.R. §300.510(b).

ISSUES

Is the last-proposed IEP offered by the District appropriate for the student?

Is the last-proposed educational placement offered by the District appropriate for the student?

FINDINGS OF FACT

1. The parties do not dispute that the student qualifies as a student with a disability under the IDEIA as a student with autism. (School District Exhibit ["S"]-50).
2. The student's IEP team met on May 31, 2007 to craft the student's IEP for 4th grade, the upcoming 2007-2008 school year. Parent approved a notice of recommended educational placement ("NOREP") for part-time autistic support for 4th grade. (S-35, S-38; Notes of Testimony ["NT"] at 232-233).

3. On October 8, 2007, the IEP team met to revise the student's IEP. The team also sought, with parent's permission, to re-evaluate the student. (S-44; NT at 235-237).
4. A re-evaluation report was issued on November 8, 2007. (S-50).
5. The IEP team met on November 19, 2007 to consider the re-evaluation report and to revise the IEP in light of the re-evaluation report. A NOREP was approved by parent on November 19, 2007 for an educational placement in part-time autistic support and itinerant learning support. (S-51, S-52).
6. The goals in the November 19, 2007 IEP did not change from the October 8, 2007 IEP. The revision was the inclusion of a behavior plan to address classroom behavior. (S-51 at pages 28-32; NT at 110-111).
7. The November 19, 2007 IEP was implemented for the remainder of the 2007-2008 school year. (NT at 110-111, 185).
8. The IEP and NOREP of November 19, 2007 are the pendent program and placement for the student at the time of this decision.

9. Over the summer of 2008, the parent contacted the District to voice dissatisfaction with the student's educational placement. Specifically, the parent was dissatisfied with the student's school assignment and wished that the student be placed in a regular education placement. (NT at 197-199, 239-240).

10. The IEP team met on August 18, 2008. The parent reiterated the request for a full-time regular education placement. The District offered various alternatives, including 1.5 hours of language arts instruction in the regular education environment or even a half-day program of instruction in the regular education environment. (S-57, S-58; NT at 199-200, 217-219, 238-244).

11. Because of the District's concerns over the student's ability to manage behaviors in a regular education environment, all of the District's alternatives included the proposal of a behavioral evaluation of the student in the regular education setting by a District behavior analyst. (S-59 at page 2; NT at 205, 217-218, 239-241, 246).

12. Parent rejected the August 18, 2008 NOREP and consistently requested a regular education placement for the student. Parent

requested due process with the rejection of the NOREP. (S-56, S-58, S-59).

13. On the Nonverbal Scale of the Kaufman Assessment Battery for Children, the student placed at the 8th percentile for children Student's age, functioning in the below average range of intellectual ability. (S-50 at pages 4-5).
14. Achievement testing was conducted using the Woodcock-Johnson III Tests of Achievement. The student's basic reading skills are at grade level but reading comprehension skills are at late 1st grade level. The student's math skills are at late 3rd grade level. The student's written expression skills are at mid 3rd grade level. (S-50 at page 5).
15. A behavioral assessment was performed in May 2007. The assessment found that when presented with a directive, a corrective prompt, or work assignment, the student will sometimes in one or more of the following behaviors: hitting self on the head, refuse to reply/comply, knock over objects, throw objects, leave Student's seat, run from the area, loudly repeat words, swing Student's arms, and/or spit. The assessment recommended that the student receive significant social skill intervention, that the use

of verbal prompting be reduced and supplanted by other non-verbal or visual prompting, and that the use of positive social reinforcement be heightened. (S-30).

16. The student's positive reinforcement comes in the form of a token economy system for rewards and reinforcers such as being able to look at binders full of favorite pictures and images, candy rewards, verbal praise and singing to the student. (S-64; NT at 120).

17. During the 2007-2008 school year, the student would regularly exhibit off-task behaviors in the autism support classroom (screaming, spitting, hitting self and others), including clearing off the contents of the teacher's desk and a bookshelf. On three occasions, the autism support classroom needed to be cleared of students and adults due to the student's behaviors. Serious behavioral incidents in the regular education setting occurred in art class, including screaming, inappropriate language, throwing objects, and overturning desks. The student was often sent back to the autism support classroom from regular education settings. (S-50; NT at 118-119).

18. During the 2008-2009 school year, the student would regularly exhibit off-task behaviors in the autism support classroom (screaming, cursing, kicking, biting, scratching, destruction of property). On two occasions, the autism support classroom needed to be cleared of students and adults due to the student's behaviors. On one occasion, the learning support classroom where the student was receiving language arts instruction needed to be cleared of students and adults due to the student's behaviors. The student has experienced problematic behavior in gym and art classes, including one incident in art class where the student lunged at the special education aide, cleared off the contents of the art table, began pounding Student's head on the floor, and exhibited further aggressive behavior toward adults. In this instance, the art room needed to be cleared of students. (S-68; NT at 79-81, 90, 101, 163-164, 201-204).

19. The student's instruction in the autism support classroom includes verbal behavior techniques where instruction is broken down into a series of very precise questions and tasks to build the student's confidence and to lead to errorless learning, that is, the series of questions is asked until the correct answer to each question is provided by the student. It is a technique that includes meticulous documentation, and its goal is to build language-

learning and socialization abilities in students with autism. (S-62; NT at 62-66, 113-115, 151-161).

20. The nine District witnesses, including teachers, specialists, and administrators, unanimously testified that the student cannot be successful in a full-time regular education placement. (NT at 69, 100-101, 123, 137, 161-162, 188-190, 204-205, 212-214, 243-244).

21. The District witnesses feel that the student's success in a full-time regular education environment would be impeded by the student's need for reinforcers, the pacing of a regular education classroom, the student's frustration at not keeping pace with peers in the classroom, the need to segment minutely directions and tasks, the student's attention-seeking behavior by verbal and physical disruption, and the student's acting-out behaviors when transitioning or when re-directed. (NT at 69-70, 22-124, 137-140, 161-162, 188-190).

22. Seven of the District's nine witnesses testified that the student would not be successful in a part-time regular education classroom. (NT at 128, 168-169, 192-193, 205-206, 219).

23. Two of the District's nine witnesses, the student's current autistic support teacher and the student's reading teacher, testified that the student might be successful in the regular education classroom with rigorous modifications. Both witnesses testified, however, that success in the regular education classroom could be impeded by the student's behaviors. (NT at 94-95, 101, 103-104).
24. The District's supervisor of special education feels that, even with modifications and supports, the student would have a difficult time making educational progress in a regular education environment. Still, the director feels that "it's worth trying" [NT at page 244], contemporaneous with an evaluation by the behavior analyst in the regular education environment. The director feels this approach, seeing if instruction in the regular education classroom can be a part of the student's program and placement, will help to ensure that the District is pursuing every alternative to provide the student an education in the least restrictive environment. (NT at 239-240, 243-244).

DISCUSSION AND CONCLUSIONS OF LAW

The provision of special education to students with disabilities is governed by federal and Pennsylvania law.³ To assure that an eligible child receives a free appropriate public education,⁴ an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.”⁵ ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning.”⁶ More specifically, a student’s IEP must include specially designed instruction designed to meet the unique needs of the child and must be accompanied by any necessary related services to permit the child to benefit from the instruction.⁷

Additionally, both federal law and Pennsylvania law require that the placement of a student with a disability be in the least restrictive environment (“LRE”).⁸ Pursuant to the federal mandate:

“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.”⁹

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

⁴ 34 C.F.R. §300.17.

⁵ Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

⁶ Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

⁷ Rowley; Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993).

⁸ 34 C.F.R. §§300.114-120; 22 PA Code §14.145; see also Oberti and L.E. v. Ramsey Board of Education, 435 F.3d. (3rd Cir. 2006).

⁹ 34 C.F.R. §300.114(a)(2).

Pennsylvania law 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.”¹⁰

In this case, the student’s placement should not be in full-time regular education. A large portion of the student’s instruction in the autism support classroom is highly segmented, with directions and instruction delivered to the student in small increments. (FF 19). One of the student’s teachers testified that the student’s instruction switches focus approximately every 20 minutes (NT at 192). Additionally, the student’s autism support classroom includes the near-constant use of reinforcers such as breaking away from instruction to view binders of preferred images, edible reinforcers, verbal praise, and singing. (FF 16).

All of this argues strongly against the student’s ability to make meaningful education progress in a full-day regular education placement. And the professional opinion of those educators who have worked with the student, all of whom testified as credible witnesses, uniformly felt that the student would not be successful in a full-time regular education placement. (FF 20, 21). The record fully supports the finding that a full-time placement in a regular education classroom is not appropriate for the student.

Many of those educators felt that the student would not be successful in a part-time regular education placement. (FF 22). Even

¹⁰ 22 PA Code §14.145(1)

those educators who felt the student could be successful in a part-time regular education placement were concerned that the student's ability to make educational progress would be overwhelmed by acting-out behaviors. (FF 23).

Still, the District is committed to making sure that it attempts to educate the student in the LRE. To this end, the District is attempting to see whether the student's area of academic strength—basic reading skill—will allow Student to be instructed in language arts in the regular education classroom. (FF 10, 14, 24). The District's concern, however, that the student's acting-out behaviors will interfere with the student's educational progress, or the progress of students in the regular education classroom, seems to be well-founded. (FF 15, 17, 18). Hence, it has always sought to have the student's participation in the regular education classroom observed and formally evaluated by a behavior analyst. (FF 11).

This hearing officer lauds the District's willingness to offer a program/placement in the LRE by having the student instructed in language arts in the regular education setting. The need to evaluate the student's behavior in that classroom, however, seems vital to ensure that the student can make educational progress in that placement. This hearing officer will fashion an order accordingly.

CONCLUSION

A full-time placement for the student in the regular education environment is not appropriate. The student's August 18, 2008 IEP is an appropriate program and the District's recommended placement of a full-time autistic support classroom with itinerant learning support is also appropriate. The District's attempt to see if a less restrictive placement that includes language arts instruction in the regular education setting is admirable and will be supported by this hearing officer's order as set forth below.

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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, within 10 school days of the date of this order, the student's August 8, 2008 IEP shall be implemented as written in the autism support classroom with itinerant learning support.

The student shall participate, with appropriate supports and up to a limit of 1.5 hours per day, in homeroom in the regular education setting and will receive language arts instruction in the regular education classroom.

The District shall have a behavior analyst observe and evaluate the student in these regular education settings. The behavior analyst shall issue an evaluation report at a point where the behavior analyst feels he/she has enough data to do so. This report shall issue, however, no later than 60 calendar days from the student's first day in the regular education setting as set forth above. The IEP team shall meet within 10 calendar days after the issuance of the behavior analyst's report to

consider the report's recommendations as those recommendations
impact the student's placement in the regular education setting.

Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

December 16, 2008