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## Pennsylvania Special Education Hearing Officer

### DECISION

Child's Name: Student AD

Date of Birth: XX/XX/XX

Dates of Hearing: July 22 and 24, 2009

CLOSED HEARING

ODR No. 9603/08-09 LS

Parties to the Hearing:

Parents:

Mr.

Ms.

School District:

Ron VanLangeveld  
Director of Special Education  
Wallingford-Swarthmore School District  
101 Plush Mill Road  
Wallingford, PA 19086

Date Record Closed:

Date of Decision:

Representative:

Parent Attorney:

M. Shannon Moore, Esquire  
Gallagher, Schoenfeld, Surkin, Chupein  
25 West Second Street  
Media, PA 19063

Unrepresented

School District Attorney:

Timothy E. Gilsbach, Esq.  
Fox, Rothschild  
10 Sentry Parkway, Suite 200  
P.O. Box 3001  
Blue Bell, PA 19422-3001

July 29, 2009

August 12, 2009

Hearing Officer: Daniel J. Myers

### **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is a resident of the Wallingford-Swarthmore School District (District) with an individualized education program (IEP) who complains that the District denied Student a free and appropriate public education (FAPE) from January 8, 2007 through October 16, 2008 by providing Student with a Chapter 15 service agreement<sup>2</sup> rather than an IEP. Because a preponderance of evidence establishes that Student was successful in regular education with the accommodations provided in the Chapter 15 service agreement and did not require specially designed instruction and related services during the period in question, I find for the District.

### **ISSUES**

Whether the School District provided FAPE to Student from January 8, 2007 through October 16, 2008?

### **FINDINGS OF FACT**

1. Student is a District resident with Aspergers Syndrome, attention deficit hyperactivity disorder (ADHD) and a speech/language impairment. (NT 43, 67, 264-265)<sup>3</sup> During kindergarten an April 8, 2005, evaluation report (ER) found

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<sup>1</sup> Future references to Student will be to “Student” and will be gender neutral to further protect Student’s confidentiality.

<sup>2</sup> 22 Pa. Code Chapter 15 (this is sometimes called a “Chapter 504 Plan.”)

<sup>3</sup> References to “NT” are to the transcripts of the July 22 and 24, 2009 hearings. References to “P” and “HO” are to the Parent and Hearing Officer exhibits, respectively. The School District did not submit separate exhibits.

- Student to have a speech and language impairment as well as a need to develop peer interaction skills. (P19,p.8; NT 55) Although the ER stated that an IEP team could find Student to be in need of specially designed instruction, the District and Student's parents agreed to a develop Chapter 15 service agreement providing speech therapy services and social skills group participation. (P18; P17; P16; P12; P4,p.1)
2. Student's parents are divorced. In the fall of 2006-2007 (2<sup>nd</sup> grade), Student's Father wrote to the District with some concerns, suggesting Student might be demonstrating "hyperlexia." (P14; P15) Student's Mother believes all District personnel addressed Student's needs appropriately. (NT 252) At that time, Student's Mother and teachers met at least once every other week and discussed the fact that Student seemed immature and was having difficulty with the initial steps of socializing, making friends and being part of a group. (NT 246, 250, 254-257) Student's teacher was patient, eased student's transitions, and used timer techniques to extinguish Student's use of bathroom trips as avoidance tactics. (NT 246, 254) The District accommodated Student's fidgeting by putting Velcro on the desk seat. (NT 247) The District's speech and language therapist worked on Student's speech patterns. (NT 249)
  3. On January 9, 2007, the District reevaluated Student, diagnosed a primary disability of Aspergers Syndrome with a secondary disability of ADHD, and stated that Student was a student with a disability and in need of specially
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designed instruction. (P13; P12; NT 265) The parties then revised Student's Chapter 15 service agreement. (P13; NT 37)

4. Student's 2007-2008 3<sup>rd</sup> grade classroom-based assessments reveal good academic progress in reading, writing, spelling and math. (P3, p.6; P10) Student's spring 2008 Pennsylvania System of School Assessment (PSSA) indicated proficiency in both reading and math. (P3,p.6)
5. On May 16, 2008, believing Student needed more intensive services, Student's Father obtained a private, independent educational evaluation (IEE) from Dr. K. Dr. K's IEE indicated average range academic achievement with Student's most significant area of difficulty in organization, acquisition, encoding and retrieval of information. (NT 31, 84; P5; P4,p.10) During the evaluation, Student was focused and vigilant, cognitively rigid, inflexible and had difficulty listening to instructions, but always complied. (NT 58) Based upon reports of Student's Father, BASC rating scales, and Student's comments during the evaluation, Dr. K considered Student to be "socially suffering" and experiencing a trend of increasingly significant internalizing behaviors. (NT 39, 41, 48, 82, 89) Dr. K concluded that Student requires an IEP with specially designed goals and objectives, an empirically-based standardized social skills curriculum with base line monitoring and specific interventions and treatments, social peer groups, a functional behavioral assessment (FBA), and pragmatic language skills instruction. (NT 70, 73-75) Dr. K's conclusion regarding the severity of Student's impairment is not based upon "anything formal or standard," but rather upon Dr. K's own experience. (NT 88)

6. On September 4, 2008, a District ER reviewed Dr. K's diagnostic impressions and recommended no special education support of academic skills or executive functioning because Student's academic achievement was already on grade level. The ER did state that Student's IEP team could decide to create an IEP for speech and language skills and social skills. (P4,p.17)
7. On September 17 and 19, 2008, Student's IEP team met to develop an IEP. (P3,pp.13-15) When Student's Father expressed concerns regarding Student's gross motor skills, the team agreed to a physical therapy (PT) evaluation. (P3)
8. On October 16, 2008 the District issued a Notice of Recommended Educational Placement (NOREP) proposing the initial provision of special education services, with an IEP containing goals for self-recognition of emotions, recognition of others' emotions, perspective taking and friendship skills. (P2; P3,p.13)
9. On January 8, 2009, Student's Father filed a due process hearing complaint, alleging that the District failed to timely and appropriately identify Student as an exceptional student, failed to provide an appropriate program, failed to properly monitor Student's progress, failed to issue a permission to evaluate Student, and failed to timely evaluate Student. (P1)
10. Student's Mother doesn't think the IEP is much different from Student's previous Chapter 15 Service Agreements. (NT 268) Student's Mother does not believe Student has suffered any educational loss since January 8, 2007 as a result of not having an IEP. (NT 271) In light of a lack of communication between Student's separate households, however, Student's Mother does believe the IEP will be

useful in keeping both parents on the same page with respect to understanding Student's needs as well as communicating with the District. (NT 270-271)

11. An evidentiary hearing was conducted on July 22 and July 24, 2009. Hearing Officer Exhibit HO1, and Parent Exhibits P-1 through P-15 and P-17 were admitted into the record with no objection. Parent Exhibit P-19 was not admitted into the record. (NT 8, 348) The School District did not submit separate exhibits. The record was closed upon receipt of the transcript on July 29, 2009.

### **DISCUSSION AND CONCLUSIONS OF LAW**

With respect to allocation of the burden of proof, the U.S. Supreme Court has established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Schaffer v. Weast, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005) Consequently, in this case, Student's Father bears the burden of persuasion because he complains that the District denied Student FAPE by providing Student with a Chapter 15 service agreement, rather than an IEP, from January 8, 2007 through October 16, 2008.

To be eligible for an IEP, Student must have a recognized disability and be in need special education and related services. 34 CFR §300.111 There is no dispute that Student has a disability.

Following Dr. K's May 2008 IEE, the IEP team determined in fall 2008 that Student should have an IEP. Student's Father argues, however, that Student should have had an IEP for the previous 1 ½ school years, back to January 8, 2007.

Student's need for special education, however, had not been demonstrated during the time at issue. Indeed, a preponderance of evidence confirms that Student had been

successful in regular education with the accommodations provided in the Chapter 15 service agreement.

In the fall of 2006-2007 Student's Mother believes all District personnel addressed Student's needs appropriately. (NT 252) Student's teacher was patient, eased student's transitions, and used timer techniques to extinguish Student's use of bathroom trips as avoidance tactics. (NT 246, 254) The District accommodated Student's fidgeting by putting Velcro on the desk seat. (NT 247) The District's speech and language therapist worked on Student's speech patterns. (NT 249) Student's 2007-2008 3<sup>rd</sup> grade classroom-based assessments reveal good academic progress in reading, writing, spelling and math. (P3, p.6; P10) Student's spring 2008 Pennsylvania System of School Assessment (PSSA) indicated proficiency in both reading and math. (P3,p.6) Even Dr. K's May 16, 2008 IEE indicated average range academic achievement. (NT 31, 84; P5; P4,p.10) Finally, the District's September 4, 2008 ER reconfirmed that Student's academic achievement was already on grade level. (P4,p.17)

Student's Father argues that, without an IEP, there naturally are no data regarding any measurable progress in Student's areas of deficit in organization, acquisition, encoding and retrieval of information. (NT 31, 84; P5; P4,p.10) Student's Father points to Dr. K's professional conclusion that Student required an IEP with specially designed goals and objectives, an empirically-based standardized social skills curriculum with base line monitoring and specific interventions and treatments, social peer groups, a functional behavioral assessment (FBA), and pragmatic language skills instruction. (NT 70, 73-75)

Dr. K's conclusion, however, is not as comprehensively based as the District's conclusions. Dr. K's conclusions that Student was "socially suffering" and experiencing

a trend of increasingly significant internalizing behaviors use equivocal terms. Further, Dr. K's conclusions are based upon reports of Student's Father, BASC rating scales, and Student's comments during the evaluation, rather than upon more comprehensive data that would include input from Student's Mother and teachers. (NT 39, 41, 48, 82, 89)

Further, Dr. K's conclusion regarding the severity of Student's impairment is not based upon "anything formal or standard," but rather upon Dr. K's own experience. (NT 88)

The record establishes that Student made progress under the Chapter 15 Service Agreement, that Student's Mother was satisfied with this progress, and that Student was not in need of specially designed instruction and related services during the period from January 8, 2007 through October 16, 2008. Accordingly, the District provided FAPE during that period and the request of Student's Father for compensatory education is denied.

### **CONCLUSION**

A preponderance of evidence establishes that Student was successful in regular education with the accommodations provided in the Chapter 15 service agreement and did not require specially designed instruction and related services from January 8, 2007 through October 16, 2008. While Dr. K's IEE serves as an appropriate basis for the October 16, 2008 IEP, it does not establish that Student required an IEP for the prior 1 ½ school years. Accordingly, the request of Student's Father for compensatory education is denied.



**ORDER**

- The School District provided FAPE to Student from January 8, 2007 through October 16, 2008.
- The request of Student's Father for compensatory education is denied.

*Daniel J. Myers*

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Daniel J. Myers  
HEARING OFFICER

August 12, 2009