

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: Student

Date of Birth: xx/xx/xx

Dates of Hearing: May 26, August 13, August 17, September 21, 2009

CLOSED HEARING

ODR No. 9697/08-09 LS

Parties to the Hearing:

Parents:

School District:

Director of Special Education
Hempfield School District
200 Church Street
Landisville, PA 17538

Representative:

Parents Attorney:
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1423 East Market Street
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School District Attorney:
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Date Record Closed: September 28, 2009

Date of Decision: October 6, 2009

Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student)¹ is an elementary-school aged resident of the Hempfield Area School District (District) with a disability who currently receives special education services in the learning support classroom (Classroom A) in Student’s neighborhood school (Neighborhood School). The District proposes placing Student in its autistic support classroom (Classroom B), which is located in a different school building (Other School). Student argues that the District’s proposed program and placement fails to meet least restrictive environment (LRE) requirements because it is not in Student’s neighborhood school building. The District prevails in this case because Student does not have a per se right to attend the Neighborhood School, and the record establishes that the District’s proposed program and placement is appropriate and satisfies LRE requirements.

ISSUE

- Whether the District’s proposed program and placement is in the LRE if it is not in Student’s Neighborhood School?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is an elementary-school-aged 3rd grader with autism. (S14; S15; S16; NT 25-27)² Student is verbal, can name all upper and lower case letters, identifies seven kindergarten-level sight words in isolation,

¹ All future references to Student will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect Student’s/her privacy.

² References to “HO,” and “S” are to the Hearing Officer and District exhibits, respectively. References to “P” and “E” are to the Parents’ exhibits. References to “N.T.” are to the transcripts of the hearings conducted in this matter.

- counts from 1-30 with assistance, adds single digit numbers, and needs help with basic self-help such as clothing fasteners and toileting. (NT 138-139)
2. Neighborhood School contains a learning support classroom (Classroom A) and a life skills classroom. Classroom A provides 2nd and 3rd grade level academic instruction in language arts and math to 25 students with disabilities. (NT 125, 131)
 3. This District's only elementary-age autistic support (AS) classroom is Classroom B in Other School. Classroom B has six students total, all of whom are autistic, some of whom are verbal, ranging in age and ability from kindergarten to 3rd grade, and two of whom are mainstreamed for nonacademic regular education classes (Specials). (NT 204, 208, 210) The maximum class size is eight children. (NT 204) Classroom B has a teacher, a full-time aide and a part-time aide, all with experience in autistic support services. (NT 203, 207, 215) Classroom B utilizes a predictable schedule and implements the Assessment of Basic Language and Learning Skills (ABLBS) curriculum. (NT 53) Classroom B has many sensory activities, including a swing, a trampoline, and a deep pressure roller. (NT 53, 215) Other School's regular education teachers have more experience in mainstreaming children with autism than the regular education teachers in Neighborhood School. (NT 216)
 4. Since Student first began attending the District's schools in kindergarten, the District has consistently recommended, at least annually, that Student be assigned to Other School, spending 50% of the day receiving AS services in Classroom B and 50% of the day mainstreamed in specials. (NT 25-27, 140, 163-164; S1; S2;

- S3; S6; S14; S15; S16) Just as consistently, Student's parents have disagreed with the District's recommendations, insisting that any educational programming must occur in Neighborhood School.
5. Whether in Classroom A or in Classroom B, the amount of time that Student would spend in special education and regular education classes is the same: 50% in special education class and 50% in regular education class. (NT 136-137)
 6. Since kindergarten, the District has made adjustments to the Neighborhood School's regular and special education environments to address Student's needs, including: limiting class size in Student's regular education class to no more than fifteen students (NT 55, 334, 337); selecting special and regular education teachers specifically suited for Student (NT 325); hiring a full-time personal care assistant with a degree in elementary education to work consistently with Student for the past three years (NT 325); monthly team meetings (NT 39, 134, 332); and regular, ongoing consultation with the Intermediate Unit's (IU) AS inclusion specialist. (NT 49, 335)
 7. The District contends that Student is not making academic progress in Classroom A despite all of its adjustments. Specifically, Student's sight words, letter sounds, and rote counting hasn't improved in two years. (NT 140) Student's progress in communication skills is very limited. (NT 52) Student has made progress in the morning routine, i.e., coming into classroom, hanging up coat and going to school. (NT 52, 60) Student's vocabulary also has increased slightly. (NT 52)
 8. In January 2009, the District requested parental permission to evaluate Student, which permission was refused. (NT 52-353)

9. On February 5, 2009 the parents, through counsel, rejected the District's January 29, 2009 proposal that Student attend Classroom B, and requested due process. (S14; NT 47-52) On February 23, 2009 the District's sufficiency challenge was denied. (S15; S16; HO2)
10. Meanwhile, Parents privately secured an evaluation by Dr. N, a Ph.D. in special needs education, who has been an associate professor of special education for ten years and serves on an advisory panel to the Pennsylvania Department of Education's Bureau of Special Education regarding implementation of LRE requirements. (S19; E13; NT 702, 708-709, 711) Dr. N has substantial work experience in vocational rehabilitation and the transition from school to work of older students with special needs. (NT 703-707)
 - a. Dr. N interviewed parents, Student's home-based behavioral specialist, and District's special education director. Student observed Student at home and in Classroom A at Neighborhood School, but did not observe Classroom B at Other School. (NT 719, 746-747) Student reviewed Student's IEPs as well as the transcripts and exhibits that had been introduced to date in this due process hearing. (NT 749) Dr. N also relied upon other experts who answered Dr. N's questions about Student as well as provided Dr. N with general opinions about children with disabilities. (NT 767-768)
 - b. Dr. N concluded that, while Student's IEP goals might benefit from further analysis, they were substantively appropriate. (S19, p.3; E1; E3; E12; E13) He also concluded, however, that Student's placement in

groups other than with non-disabled peers was inappropriate. (S19, p.2)

Dr. N further does not believe the District is maximizing Student's learning opportunities. (NT 770)

- c. Dr. N believes that, because the District has not reevaluated Student in more than three years, the District is unable to determine correctly whether it is appropriate to place Student in the Classroom B at Other School. (NT 759, 762) He concludes that the District lacks sufficient data to support its plan to move Student to Other School. (S19, p.5)
- d. Dr. N also does not believe that the District has fully attempted to implement specially designed instruction and accommodations in the regular education environment. (S19, p.4, 5; NT 759, 762) He believes that the District's annual recommendations since kindergarten that Student attend Classroom B have unintentionally and unconsciously limited the District's offers of FAPE. (NT 757-759) He believes that any and all strategies that the District intends to implement in Classroom B at the Other School can easily be provided in the LS class at Neighborhood School. (NT 753, 766)
- e. Dr. N cannot state specific strategies that Neighborhood School can implement, but believes that, if District engages in a brainstorming process, the IEP team will discover them. (NT 774-776) Dr. N recommends that the District utilize a comprehensive and coherent model of IEP development that attempts to meet Student's classroom and social participation needs in the general education classroom. (S19, p.6; E15)

Such techniques are “the foundational stuff of using supplemental aids and services to discover the strategies,” as well as person-centered planning, a circle of support, and relationship-mapping. (NT 769)

f. Finally, Dr. N believes that moving Student out of Neighborhood School will result in unintended negative consequences. (NT 752)

i. First, Student will lose a current connection to Neighborhood School and to the local community. This connection was demonstrated at the Neighborhood School playground when other children of Student’s age approached Student, and Student engaged in parallel play. (NT 764) In addition, Student’s parents intentionally moved to the community in which Neighborhood School is located so that Student could build roots and be integrated into that community. (NT 761)

ii. Second, Dr. N believes that, if Student attends Classroom B, Student will mirror the autistic behaviors of peers in that classroom, rather than the more typical behaviors of non-disabled peers in the mainstream classes. This opinion is based upon Student’s home-based behavioral specialist’s statement that Student is very environment-dependent. (NT 760, 765) Noting that, generally, adults who are in segregated workshops have difficulty generalizing their skills to other environments, Dr. N concludes that Student could have the same difficulty in self-

expression or in relating to people. (NT 755) Dr. N concluded that the risk of marginalization is too great. (NT 762-763)

11. Hearings were conducted on May 26, August 13, August 17, and September 21, 2009. Admitted into the record were Hearing Officer exhibits HO1 and HO2, District exhibits S1-S23, and Student's exhibits P1-P6, and E1-E33. (NT 813-814)

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof

In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. In L.E. v. Ramsey Board of Education, 435 F.3d 384 (3rd Cir. 2006), the Third Circuit Court of Appeals explicitly extended the Schaffer burden of proof analysis to a parental challenge to an IEP based upon an LRE violation.

It is, however, somewhat challenging to allocate the burden of proof to parents alleging an LRE violation, because both the IDEA regulations and controlling case law place an affirmative duty on districts to assure that an eligible child is not removed from the regular education environment unless, and only to the extent, necessary. In Oberti v. Board of Education, the Third Circuit described the IDEA's LRE requirements as a "presumption" in favor of educating an eligible child with non-disabled peers. 995 F.2d 1204 (3rd Cir. 1993) at 1214 Moreover, in L.E. v. Ramsey Board of Education, *supra*, the administrative hearing and district court decisions were issued when school districts had the burden of proof, and those decisions were affirmed on that basis.

In Moore v. Kulicke & Soffa Industries, Inc., 318 F.3d 561 (3rd Cir. 2003), the Court discussed the role of presumptions in a burden of proof analysis, concluding that when the party with the ultimate burden of proof successfully raises a presumption under the governing law, the burden of production shifts to the opposing party to come forward with some evidence to rebut the presumption. Failing that, the party with the burden of proof prevails on that issue. In the absence of specific guidance from the courts with respect to how the statutory/regulatory LRE standards as explained in Oberti should be analyzed and applied in light of Schaffer and Ramsey, and noting that the Supreme Court specifically allocated only the burden of persuasion, which remains with parents, it makes sense to adopt and apply the Moore analysis with respect to the LRE issue in this case.

PL v North Penn School District, ODR #00004-0910LS (8/24/09)

In other words, after parents bear the initial burden of establishing facts that could support an LRE violation, the burden shifts to the District to rebut the “presumption” in favor of educating an eligible child with non-disabled peers.

Student does not have a presumed right to a neighborhood school placement

The Individuals with Disabilities Education Improvement Act (IDEIA or Act) requires that, to the maximum extent appropriate, children with disabilities shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 USC §1412(a)(5)

This LRE requirement has been echoed in the federal government's implementing regulations at 34 CFR §300.116. The federal regulations include an additional LRE requirement, however, that is not contained in the statute. Unless an eligible child "requires some other arrangement, the child [must be] educated in the school Student or she would attend if not disabled." 34 C.F.R. §300.116(c)

When the U.S. Department of Education (USED) issued Section 300.116(c), it acknowledged that IDEA does not mandate that a child with a disability be educated in the school Student or she would normally attend if not disabled. 71 Fed. Reg. 46588 (August 14, 2006) USED noted in the Preamble to its regulations, however, that it has consistently maintained that a child with a disability should be educated in a school as close to the child's home as possible, unless the services identified in the child's IEP require a different location. Id.; See USED's previous regulation at 34 CFR §300.552(b)(3) USED also asserted, without citation, that section 612(a)(5)(A) of the Act presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Id.

The Act, however, does not contain such a presumption. See White v. Ascension Parish Sch. Bd., 343 D.3d 373 (5th Cir. 2003) ("It must be emphasized that the proximity preference or factor is not a presumption that a disabled student attend Student's or her neighborhood school"), citing Flour Bluff Independent School District v. Katherine M., 91 F.3d 689 (5th Cir. 1996), cert. denied, 519 U.S. 1111, 117 S. Ct. 948, 136 L.Ed.2d 836 (1997) Indeed, a consistent, long line of cases has established that there is no per se right to a neighborhood school placement under the IDEA's preference for LRE. Kevin G. v.

Cranston School Comm., 130 F.3d 481 (1st Cir. 1997); Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir. 1991); White v. Ascension Parish School Board, 343 D.3d 373 (5th Cir. 2003); McLaughlin v. Holt Public School. Board of Education, 320 F.3d 663 (6th Cir. 2003); Hudson v. Bloomfield Hills Public School, 108 F.3d 112 (6th Cir.1997); Schuldt v. Mankato Independent School District, 937 F.2d 1357 (8th Cir. 1991); Wilson v. Marana Unified School District No. 6 of Pima County, 735 F.2d 1178 (9th Cir.1984); Urban v. Jefferson County School District, 89 F.3d 720 (10th Cir. 1996); Murray v. Montrose County School District, 51 F.3d 921 (10th Cir.), cert. denied, 516 U.S. 909, 116 S. Ct. 278, 133 L.Ed.2d 198 (1995); Joel P. v Cheltenham School District, 949 F. Supp. 346, 25 IDELR 138 (E.D. Pa. 1996)

Even USED's own opinions do not establish that the Act presumes a neighborhood school placement. Letter to Veazey, 37 IDELR 10 (OSEP 2001) (Assignment of a particular school is an administrative determination); Letter to Anonymous, 21 IDELR 674 (OSEP 1994) (student with a disability may be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual needs of the student); Letter to Fisher, 21 IDELR 992 (OSEP 1994) (citing policy letter indicating that assignment of a particular location is an administrative decision)

Thus, any LRE analysis in this case shall not include a presumption that Student must be assigned to Neighborhood School.

Classroom B is in the LRE most appropriate for Student

Step One of the Oberti Analysis is Satisfied

Without a presumption of assignment to Neighborhood School, the first step in an LRE analysis of the District's recommended Classroom B placement is an assessment of whether Student can be educated satisfactorily in the regular classroom with supplementary aids and services. Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993); Greenwood v. Wissahickon School District, 571 F.Supp.2d 654 (E.D. Pa. 2008)

Although Dr. N also does not believe that the District has fully attempted to implement specially designed instruction and accommodations in the regular education environment (S19, p.4, 5; NT 759, 762), that is not the issue in this case. In this case, regardless of whether Student attends Other School or Neighborhood School, Student would spend the same amount of time in regular education – 50% in special education class and 50% in regular education class. (NT 136-137) Since Student first began attending the District's schools in kindergarten, the District has consistently recommended, at least annually, that Student be assigned to Other School, spending 50% of the day receiving AS services in Classroom B and 50% of the day mainstreamed in specials. (NT 25-27, 140, 163-164; S1; S2; S3; S6; S14; S15; S16) Just as consistently, Student's parents have disagreed with the District's recommendations, insisting that any educational programming must occur in Neighborhood School.

Because both the relief sought by Student's parents (Classroom A) and the District's proposed placement (Classroom B) involve the same amount of time in special and regular education classes, the record establishes that education outside of the regular education classroom for 50% of the school day is necessary. Thus, the first step of the Oberti analysis is satisfied.

Step Two of the Oberti Analysis is Satisfied

If education outside of the regular education classroom for all or part of the school day is found necessary, the proposed placement must then be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. The continuum of placements mandated by the IDEA statute and regulations is designed to ensure that a school district does not take an “all or nothing” approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met. L.E. v. Ramsey Board of Education, 435 F.3d 384, 390 (3rd Cir. 2006)

As noted above, both the relief sought by Student’s parents (Classroom A) and the District’s proposed placement (Classroom B) involve the same amount of time in special and regular education classes. Thus, neither the relief sought by Student, nor the relief sought by the District, involves more contact with non-disabled peers. Thus, the record in this particular case establishes that the second step of the Oberti analysis is satisfied.

Student offers, however, what might be considered several alternative theories of Student’s LRE case. First, Dr. N believes that placement in an AS classroom is more restrictive than placement in a learning support classroom, even though both placements are for 50% of the day. Dr. N believes Student will mirror the autistic behaviors of peers in Classroom B, rather than the more typical behaviors of non-autistic, disabled peers in Classroom A. (NT 760, 765) Noting that, generally, adults who are in segregated workshops have difficulty generalizing their skills to other environments, Dr. N concludes that Student could have the same difficulty in self-expression or in relating to people. (NT 755)

To the extent that the LRE requirement is based upon an assumption that Student will model the behaviors of non-disabled peers, there is no evidence in this record regarding Student's behavior-modeling. Dr. N observed Student engage in parallel play, not behavior modeling. (NT 764) Further, Dr. N's experiences with disabled adults in segregated workshops, and his reliance upon the general opinions of other experts about children with disabilities(NT 767-768), are insufficient bases upon which to conclude that this Student will mirror the autistic behaviors of peers in Classroom B.

Second, Dr. N believes that placement at Other School is more restrictive than placement at Neighborhood School. This is because Student's parents intentionally moved to the community in which Neighborhood School is located so that Student could build roots and be integrated into that small community, and Dr. N believes placement in Other School will not develop Student's relationships within Student's neighborhood. (NT 761, 764) Dr. N, however, only observed Student at home and at Neighborhood School, but not at Other School. (NT 719, 746-747) There is no factual basis in this record upon which to compare the effects of placement in Other School and placement in Neighborhood School.

In addition, nothing in the statute or regulations supports Parents' implicit argument that an IDEA LRE violation can be based upon diminishment of an eligible child's opportunities for out of school relationships. The LRE requirements specifically refer to an eligible child's opportunities to interact with non-disabled peers while at school or while engaged in non-instructional school-related functions, such as extra-curricular activities. See 34 C.F.R. §§300.114(a), 300.116, 300.117, all of which refer to school-based "educational" placements and activities. There is no statutory/regulatory

basis for the notion that a school district's LRE obligations extend to disabled students' community-based, out of school opportunities to interact with non-disabled peers. PL v North Penn School District, ODR #00004-0910LS (8/24/09)

Third, Dr. N believes that the District's annual recommendations since kindergarten that Student attend Classroom B have unintentionally and unconsciously limited the District's offers of FAPE. (NT 757-759) He believes that any and all strategies that the District intends to implement in Classroom B at the Other School can easily be provided in the LS class at Neighborhood School. (NT 753, 766) He is concerned that the "risk of marginalization" is too great. (762-763)

The credibility of Dr. N's opinion is undermined by its lack of factual bases and its reliance upon far-ranging speculations. Dr. N cannot state specific strategies that Neighborhood School can implement, but believes that, if District engages in a brainstorming process, the IEP team will discover them. (NT 774-776) Dr. N recommends that the District utilize a comprehensive and coherent model of IEP development that attempts to meet Student's classroom and social participation needs in the general education classroom. (S19, p.6; E15) The most specific techniques that Dr. N can suggest are "the foundational stuff of using supplemental aids and services to discover the strategies," as well as person-centered planning, a circle of support, and relationship-mapping. (NT 769)

In contrast, the District provided extensive evidence of the strategies that it used to program for Student's needs at Neighborhood School. These include: limiting class size in Student's regular education class to no more than fifteen students (NT 55, 334, 337); selecting special and regular education teachers specifically suited for Student (NT

325); hiring a full-time personal care assistant with a degree in elementary education to work consistently with Student for the past three years (NT 325); monthly team meetings (NT 39, 134, 332); and regular, ongoing consultation with the Intermediate Unit's (IU) AS inclusion specialist. (NT 49, 335) ³

Based upon the record in this case, the proposed placement in Classroom B provides for contact with non-disabled peers to the greatest extent appropriate. Thus, the proposed placement satisfies the second part of the Oberti test.

The District's Proposed Placement in Classroom B is Appropriate

Parents' desire to keep Student in Neighborhood School is understandable. This Student is fortunate to have such caring and committed parents. Dr. N believes that Student's autism diagnosis has unintentionally and unconsciously driven the District's offers. (NT 757-759) Dr. N believes that, because the District has not reevaluated Student in more than three years, the District is unable to determine correctly whether it is appropriate to place Student in the AS classroom at Other School. (NT 759, 762)

Dr. N does not believe either Student's current placement in Classroom A or the District's proposed placement in Classroom B is appropriate. This opinion, however, is based upon Dr. N's conclusion that the District is not maximizing Student's learning opportunities. (NT 770) While that might be true, it imposes the wrong standard upon the District. The District is not required to maximize Student's learning opportunities, but rather to provide education sufficient to confer some educational benefit upon

³ Contrary to his argument, this record differs substantially from that in TM v Canton Area School District, ODR# 9811/08-09KE, 109 LRP 53262 (2009). In Canton, the district had considered only one option before recommending a residential out of district placement. In this case, the District has both considered, and attempted, numerous program modifications before recommending Student's in-district transfer to Classroom B at Other School. See Finding of Fact # 6, supra.

Student. TR v Board of Education of Kingwood Township, 205 F.3d 572 (3rd Cir. 2000); Hendrick Hudson Dist. Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)

Dr. N acknowledged that Student's IEP goals were substantively appropriate. (NT 770; S19, p.3; E1; E3; E12; E13) Nevertheless, Student is not making academic progress in Classroom A. Specifically, Student's sight words, letter sounds, and rote counting hasn't improved in two years. (NT 140) Student's progress in communication skills is very limited. (NT 52)

Other School's Classroom B staff are more familiar with the needs of autistic students than staff at Neighborhood School, and they can explicitly and systematically support generalization of skills in regular education class. (NT 216) Classroom B has six students total, all of whom are autistic, some of whom are verbal, ranging in age and ability from kindergarten to 3rd grade, and two of whom are mainstreamed for specials. (NT 204, 208, 210) The maximum class size is eight children. (NT 204) Classroom B has a teacher, a full-time aide and a part-time aide, all with experience in autistic support services. (NT 203, 207, 215) Classroom B utilizes a predictable schedule and implements the Assessment of Basic Language and Learning Skills (ABLLS) curriculum. (NT 53) Classroom B has many sensory activities, including a swing, a trampoline, and a deep pressure roller. (NT 53, 215)

The District has provided a reasonable and convincing rationale for recommending placement in Classroom B at Other School. Accordingly, the District's recommended placement will be implemented.

CONCLUSION

Parents have not borne their ultimate burden of proving that the District's proposed program and placement in Classroom B at Other School violates the IDEA's LRE requirement. The District, therefore, is permitted to implement its proposed IEP.

ORDER

- The District's January 29, 2009 proposed educational program and placement is appropriate.
- The District shall implement its January 29, 2009 proposed educational program and placement.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

October 6, 2009

Student
Hempfield School District
ODR No. 9697/08-09 LS